

No. 15778

United States
Court of Appeals
for the Ninth Circuit

LYON FURNITURE MERCANTILE AGENCY,
Appellant,
vs.

IRENE M. CARRIER, doing business as Wish-
maker House, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

DEC 20 1957

PAUL P. BRENN, CLERK



No. 15778

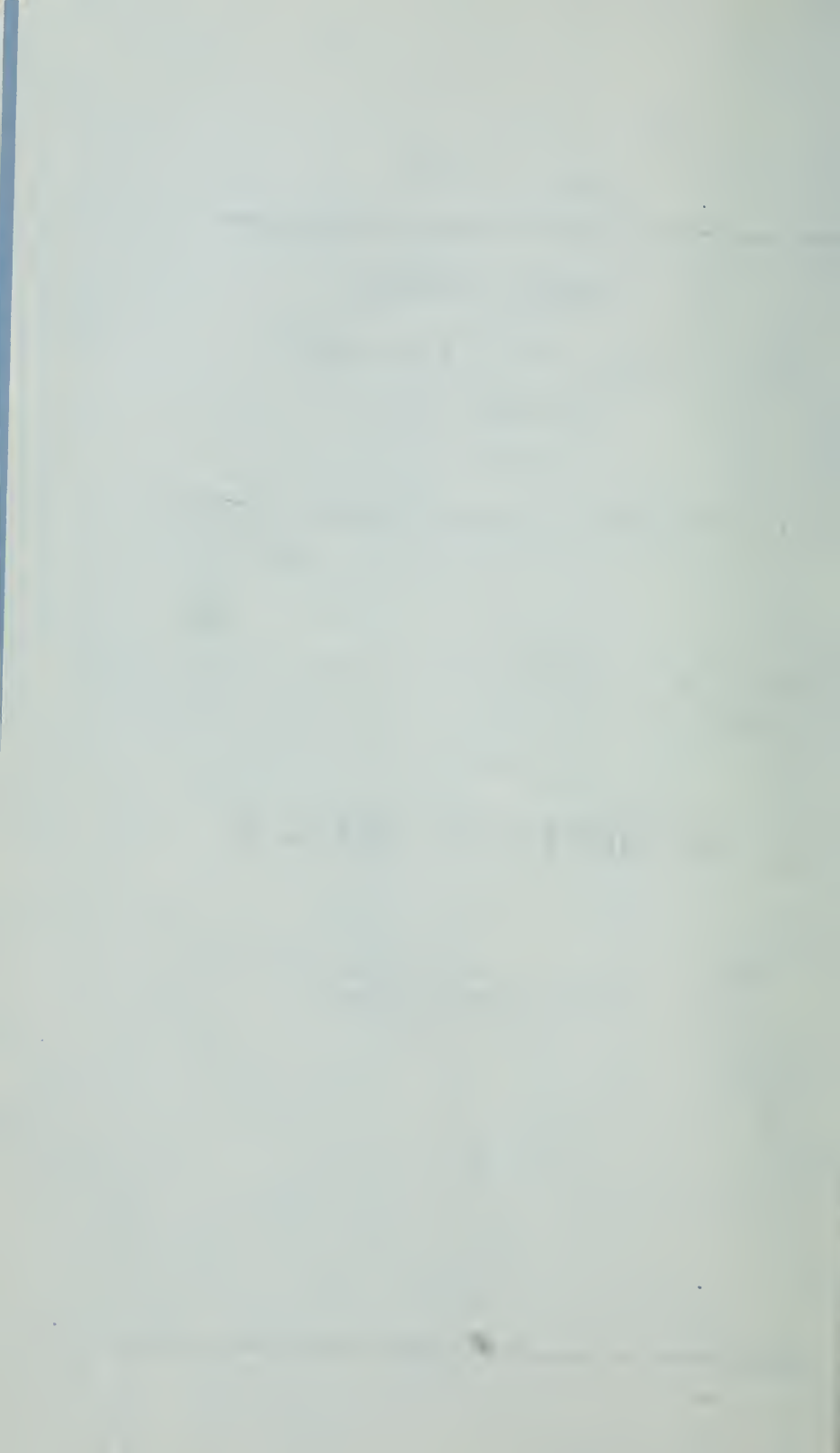
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CATLIN & CATLIN,

433 So. Spring Street,
Los Angeles 13, California,

SAMUEL A. MILLER,

208 West 8th Street,
Los Angeles 14, California.

For Appellee:

DAVID G. LICHT,

9399 Wilshire Boulevard,
Beverly Hills, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.



In the District Court of the United States,
District of California, Central Division

No. 18445-J—Civil

IRENE M. CARRIER, dba WISHMAKER
HOUSE, Plaintiff,

vs.

LYON FURNITURE MERCANTILE AGENCY,
Defendant.

NOTICE OF HEARING

To Irene M. Carrier and to David G. Licht, her
attorney:

You, And Each Of You, Will Please take Notice,
that the undersigned will bring the attached Motion on for hearing before this Court, in the court room of the Honorable Judge Gilbert H. Jertberg, Court Room No. 10, Federal Post Office and Court Building, City of Los Angeles, State of California, on the 23rd day of August, 1955, at 10:00 A.M. on the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: August 8, 1955.

CATLIN & CATLIN,

/s/ By HENRY W. CATLIN,

/s/ HENRY W. CATLIN,

Attorneys for Defendant. [2]

[Title of District Court and Cause.]

MOTION TO REQUIRE PLAINTIFF TO FILE,
AND MOTION FOR A MORE DEFINITE
STATEMENT

Comes Now the defendant, Lyon Furniture Mercantile Agency, and moves the Court as follows:

First

That plaintiff be required to file an undertaking in the sum of \$500.00, as provided by Section 830 of the California Code of Civil Procedure in actions for libel and slander, and if plaintiff does not file same within the time fixed by the Court, that said action be dismissed.

Second

That plaintiff be directed by this Court to file a more definite statement of the following matters, to wit:

(a) To describe who "certain wholesale furniture dealers" were, together with their addresses, and who "certain furniture manufacturers" were, together with their addresses, as alleged in Paragraph III, in both the First and Second Causes of Action of said complaint, so that this answering defendant can ascertain and [3] determine for the purpose of admitting or denying whether or not such parties were the parties that this answering defendant released to and furnish the credit reports and credit ratings, as therein alleged;

(b) Showing from whom (names and addresses)

plaintiff was unable to secure replacements for her stock, as alleged in Paragraph VI of the First Cause of Action of plaintiff's complaint;

(c) Showing who the majority of the dealers who formerly sold to plaintiff on credit were, and their addresses, that refused to sell to her on credit after the alleged reports were published, that are referred to in Paragraph VI of the First Cause of Action of her complaint;

(d) Showing who the "other members of a combination" referred to in Paragraph II of the Second Cause of Action of plaintiff's complaint were.

CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
/s/ HENRY W. CATLIN,
Attorneys for Defendant. [4]

Points and Authorities

Point I.

Supporting Motion to Require Undertaking Be Filed

State of California Code of Civil Procedure,
Section 830.

Kennaley v. Superior Court, 43 Cal. (2nd) 512.
Shell Oil Co. v. Superior Court, 2 Cal. App.
(2nd) 348.

Keller Research Corp. v. Roquerre, 99 Fed. Supp.
964.

Point II.

Supporting Motion for a More Definite Statement

The defendant should be advised of the names of the readers of the alleged libelous matter, for the

purpose of preparing defense, and be advised as to whether the readers were those that defendant furnished the alleged publication to, as defendant cannot be responsible to plaintiff for the voluntary and unjustifiable repetition without its authority or request by others over whom defendant had no control.

16 Cal. Jur. 139.

37 Corp. Jur. 48.

Dill Mtg. Co. v. Acme Air Appliance Co. DC, N.Y. 1941, 2 F.R.D. 151.

Adams v. Hendel DC, Pa, 1939, 28 F. Sup. 317.

Federal Rules of Civil Procedure, Rule 12, Subdivision E. [5]

Affidavit of Service by Mail Attached. [6]

[Endorsed]: Filed Aug. 8, 1955.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR LIBEL

Comes Now the plaintiff, and pursuant to order of court, and for a first cause of action complains and alleges:

I.

That the plaintiff is a citizen and a resident of the State of Arizona, and doing business under the fictitious firm name and style of Wishmaker House; that the defendant is now and at all times herein mentioned was a partnership composed of persons unknown to plaintiff, doing business under the common name and style of Lyon Furniture Mer-

cantile Agency in the County of Los Angeles, State of California; that the amount of controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and cost.

II.

That the plaintiff individually began the operation of a retail furniture business in the City of Phoenix, Arizona, during the year 1953, having acquired such business by a decree of the [8] Superior Court of Maricopa County, Arizona, from her former husband, Frank N. Carrier, Jr.; and that prior thereto the plaintiff had been actively engaged in the retail furniture business jointly with her ex-husband from the year 1947 to 1953; that at the time plaintiff acquired sole ownership of the business aforesaid, there existed liabilities in excess of Forty Nine Thousand (\$49,000.00) Dollars against said business.

That plaintiff moved said business to its present location in January, 1954; that under plaintiff's management, the business has expanded and liabilities thereon steadily diminished substantially through operation under the circumstances; that prior to March 23, 1954, plaintiff's financial credit rating was good and unquestioned.

III.

That defendant released to certain wholesale furniture dealers a credit report purportedly representing plaintiff's current credit status on March 24, 1954, a copy of which is hereto annexed and made a part hereof, marked Exhibit "A". On April

18, 1955, defendant released a credit report purportedly reflecting plaintiff's credit rating as that time, to certain furniture manufacturers, a copy of which is hereto annexed and made a part hereof, marked Exhibit "B".

IV.

That said reports were and are absolutely false in the following particulars: That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress; that the reports state that plaintiff had no previous retail furniture experience; that plaintiff employed a manager to operate said business; that 1954 payments were slow; that the bulk of plaintiff's purchases are being made on a C.O.D. basis.

V.

That the plaintiff is informed and believes and upon such [9] information and belief alleges that the following named manufacturers have received from the defendant the said Exhibit "A" and/or the said Exhibit "B": Frederick Cooper Studios, 1507 East 55th Street, Chicago, Illinois, American Furniture & Novelty Company, 2601 Flournoy Street, Chicago, Illinois; J. S. Greene Company, 1024 West Hillcrest Boulevard, Inglewood, California; B. F. Huntley Company, Winston-Salem, North Carolina; Fine Arts Furniture Manufacturing Company, 6040 Ferguson Drive, Los Angeles 22, California; Caro & Upright, 720 South Los Angeles Street, Van Nuys, California; Charm House, Inc., 14719 Lull Street, Van Nuys, California; Sandford Furniture Company, Sandford, North Carolina.

VI.

That the defendant willfully and maliciously made the aforesaid reports and delivered them to the aforementioned persons and its subscribers, knowing the same to be false when it made them, for the express and sole purpose of destroying the plaintiff's credit and financial standing and of ruining her business.

VII.

That by reason of the making and publication of this said false and libelous reports by the defendant, the plaintiff has not been able to secure replacements for stock of goods on reasonable credit terms requisite to the continual successful operation of her said business from the aforementioned furniture manufacturers and dealers who formerly sold to her on credit, but have refused to sell on such credit since said false reports were made and published.

VIII.

That by reason of the premises, the plaintiff's credit and financial standing have been ruined and her business has been substantially destroyed, and the plaintiff has thereby been made to suffer damages in the sum of Twenty-Five Thousand (\$25,000.00) Dollars. [10]

IX.

That by reason of the defendant's willful malicious publication and delivery of the said false and libelous reports, punitive damages in the sum of \$50,000.00 should be imposed upon said defendant.

For Second Separate Distinct Cause of Action
Plaintiff Alleges:

I.

The plaintiff hereby incorporates by reference paragraphs I through V inclusive of her first cause of action as though the same were here and fully set forth.

II.

That on March 23, 1954, and on April 18, 1955, the defendant and other members of a combination of persons unknown to plaintiff, plaintiff alleges on information and belief, did wrongfully and maliciously combine, conspire, and confederate together, intending to injure plaintiff and destroy her said business and to prevent her earning a subsistence for herself or her family, and the said combination then did wrongfully, falsely, libelously, and maliciously write, utter, and publish the said false statements heretofore referred to in plaintiff's complaint.

III.

That as a result of defendant's unlawful conspiracy, plaintiff was unable to secure on reasonable credit sufficient stock for her business to operate effectively and successfully.

IV.

That the said actions of the defendant have substantially injured and destroyed plaintiff's business, to the plaintiff's damage of \$25,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$25,000.00 actual damages,

and \$50,000.00 punitive damages, and for costs of this suit.

/s/ DAVID G. LICHT,
Attorney for Plaintiff. [11]

EXHIBIT "A"

Lyon-Red Book Report

This report is furnished, at your request, in accordance with the terms of your contract with the Lyon Furniture Mercantile Agency. It is to be held strictly confidential. It is for your exclusive use and to be used only as an aid to determine the advisability of granting credit.

Carrier, Irene M. Age 45, Divorced (Wishmaker House).

FC&Apl Phoenix, Arizona
1017 E. Camelback Road

Rev: (be-ll) March 23, 1954.

Antecedents: On August 1, 1946, Frank N. Carrier, Jr. acquired this business located at 943 E. Van Buren Street from Joseph Peternel. He is reported to have continued the business until the summer of 1953, when because of reported marital difficulties, the business was taken over by Irene M. Carrier, his wife. She operated under the style Carrier's Furniture Company. About February 15, 1954, she moved to 1017 E. Camelback road and adopted the style, Wishmaker House.

It is learned that Irene M. Carrier has had no previous experience in their retail furniture business and that a manager is employed to operate the business.

During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1000. Payments were made as agreed up to February 23, 1954. On March 9, 1954, her attorney's dispatched a letter to creditors requesting a moratorium of the payments of \$1000 per month for a period of three months commencing March 15, 1954 and including April and May installments.

General Information: Present owner during the summer of 1953 acquired this business from her husband who had been the owner since August 1, 1946. During November 1953, she was granted an extension by her creditors and at this time has requested a moratorium for payments for three months commencing March 15, 1954. She recently moved to new quarters in a more favorable area for a business of this type. Quarters occupied are leased.

She retails a general line of furniture, floor coverings, bedding, stoves and electrical appliances. Sales are made for cash and on various credit terms.

Financial Information: Since acquiring this business, Irene M. Carrier has not been disposed to furnish financial statements direct. Interviewed by Agency's local representative on March 4, 1954, she declined all information of a financial nature.

Investigation discloses that she maintains a bank account here, has something in receivables and a low five figure inventory. Liabilities are reported to be relatively heavy. She is now operating under an

extension agreement and has requested a moratorium for three months.

Lacking current statement and due to the present financial condition of the business, no estimate of financial responsibility is advanced.

Trade Investigation: During the latter part of 1953, payments are reported to have been slow.

Inquiry at this time finds payments generally slow with majority of suppliers showing a preference for C.O.D. transactions.

Summary: Present owner acquired this business during the summer of 1953 from her former husband, Frank M. Carrier, Jr. She is now operating under an extension agreement. Current statement has not been supplied direct and no estimate of financial responsibility is advanced. Payments are slow and a number of suppliers have shown a preference for C.O.D. transactions.

L:(C-O-H-N)—Rate: (CON) 13-6—(n.i) [12]

EXHIBIT "B"

Lyon-Red Book Report

This report is furnished, at your request, in accordance with the terms of your contract with the Lyon Furniture Mercantile Agency. It is to be held strictly confidential. It is for your exclusive use and to be used only as an aid to determine the advisability of granting credit.

FC&Apl Phoenix, Arizona
1017 E. Camelback Road

Carrier, Irene M. Age 47, Divorced, (Wishmaker House).

Rev: (dl-ll) April 18, 1955.

Antecedents: On August 1, 1946, Frank N. Carrier, Jr. acquired this business located at 943 E. Van Buren St., from Joseph Peternel. He is reported to have continued the business until the Summer of 1953 when because of reported marital difficulties, the business was taken over by his wife, Irene M. Carrier. She operated under the style, Carrier's Furniture Co. About Feb. 15, 1954, she moved to 1017 E. Camelback Rd. and adopted the style, Wishmaker House.

It is learned that Irene M. Carrier has had no previous experience in the retail furniture line and that a manager is employed to operate the business.

During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1000. Payments were made as agreed up to Feb. 23, 1954. On Mar. 9, 1954, her attorneys dispatched a letter to creditors requesting a moratorium of the payments of \$1000 per month for a period of three months commencing March 15, 1954 and including April and May installments.

Irene M. Carrier, through her attorney, during August 1954, offered creditors a 50% compromise settlement, both on open accounts and those accounts that were in judgment. Some of her creditors are reported to have accepted this offer.

During January 1955, Irene M. Carrier offered a single payment of 10% of the original balance due her creditors in full settlement of her account. Some of the creditors accepted this offer, which

including previous payments afforded them 79% of the original balance.

General Information: Business is established. During August 1954, and again during January 1955, she is reported to have made a compromise settlement with some of her creditors. Quarters occupied are leased.

She retails a general line of furniture, floor coverings, bedding, stoves and electrical appliances. Sales are made for cash and on regular credit terms.

Financial Information: The following signed statement was received by mail showing condition as of Mar. 20, 1955:

Assets

Current;

Cash on hand and in bank	591.24	
Accounts receivable	4,065.98	
Mdse. inventory	8,478.17	
Dealers res. Bank	35.10	
Gen. Elec. Credit corp.	698.19	733.29
		<hr/>
Deposits	345.00	
		<hr/>
total current		15,213.68

Fixed assets;

Equipment	3,356.31	
Less res. for deprec.	2,448.79	907.52
		<hr/>
Truck, auto, neon sign net	6,490.00	
Leasehold impr.	2,915.10	
		<hr/>
total fixed		10,312.62

Deferred assets;

Prepaid insurance	1,213.52	
Overpayment to tax comm.	20.40	
		<hr/>
total deferred assets		1,233.92

Total Assets		<hr/> 26,760.22
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16 *Lyon Furniture Mercantile Agency vs.*

Liabilities

Accounts payable current	844.69	
Accounts payable Frank Hill*	550.56	
A/P Hill payable at 3% per mo.		
Contracts payable Elec. Prod.	391.96	
Long term mtge.		
Frank Avinelis**	6,000.00	
Res. for taxes	350.00	
		<hr/>
Total Liabilities		8,137.21
Net Worth		
Irene Carrier capital		18,623.01
Total		26,760.22

* Note Outstanding accts. payable of \$49,000. reduce to \$9700. and settled with creditor for \$3,000. with the exception of the above listed under Frank Hill.

** Payable at \$100. per mo.

Analysis: As will be noted in statement, accounts payable were reduced from \$4900, by compromise with some of her creditors, to \$9700, and this amount was in turn, settled for \$3,000 with the exception of the amount listed owing Frank Avinelis. Current statement shows liquid and current ratio sub-standard, but net worth ratio above the accepted standards. Her affairs have shown considerable improvement.

Due to the fact that she has made a compromise settlement with some of her creditors, during the past year, no estimate of financial responsibility is advanced.

Trade Investigation: 1953 payments were slow. 1954 payments were slow.

Inquiry of March 29, 1955:

Manner of Payment	Days Slow	High Credit	Owing	Past due	Last sale
1—Discount		200			3/55
2—Prompt		505			
3—Medium	30	130	130		
4—C.O.D.					
5—C.O.D.					
6—C.B.D.					
7—C.B.D.					
8—C.O.D.					

Collection Record

During 1953, eight items of collection were placed with Agency.

Summary: Business is established. During the past year, the owner effected a compromise settlement with some of her creditors. Current statement indicates some improvement in financial condition. No estimate of financial responsibility is advanced. The bulk of her purchases are now being made on a C.O.D. basis.

L:(C-O-H-N) Rate: (Con) 13 (b.i.) [13]

Duly Verified.

Affidavit of Service by Mail Attached. [14]

[Endorsed]: Filed Sept. 21, 1955.

United States District Court, Southern
District of California, Central Division

No. 18,445-J—Civil

MINUTES OF THE COURT

[Title of Cause.]

Date: Aug. 23, 1955. At: Los Angeles, Calif.

Present: Hon. Gilbert H. Jertberg, District
Judge.

Deputy Clerk: S. W. Stacey. Reporter: Helen
Schulke.

Counsel for Plaintiff: David G. Licht.

Counsel for Defendant: Henry W. Catlin.

Proceedings: For hearing on defendant's motion
to (1) require plaintiff to file undertaking for costs,
and (2) for more definite statement.

Court hears argument of counsel. Motion (1) to
require plaintiff to file undertaking for costs is
denied, and motion (2) for more definite statement
is granted, and plaintiff is ordered to make more
definite statement.

JOHN A. CHILDRESS,
Clerk. [7]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT

Comes Now the defendant, Lyon Furniture Mer-
cantile Agency, and answering plaintiff's amended
complaint admits, denies and alleges as follows:

I.

Answering Paragraph II of the plaintiff's first cause of action, this answering defendant admits that plaintiff individually began the operation of a retail business in the City of Phoenix, Arizona, during the year 1953, having acquired such business by a decree of the Superior Court of Maricopa County, Arizona, from her former husband, Frank N. Carrier, Jr.

Answering plaintiff's allegation "that at the time plaintiff acquired sole ownership of the business aforesaid, there existed liabilities in excess of Forty Nine Thousand Dollars (\$49,000.00) against said business," this answering defendant has no information [15] or belief sufficient to enable it to answer said allegation and basing its denial upon that ground, generally and specifically denies that at the time plaintiff acquired sole ownership of the business there existed liabilities in excess of Forty Nine Thousand Dollars (\$49,000.00), or any other sum.

Further answering Paragraph II, this answering defendant denies generally and specifically each and every allegation therein set forth not herein specifically admitted, and specifically denies that prior to March 23, 1954 plaintiff's financial credit rating was good and unquestioned.

II.

Answering Paragraph III of plaintiff's first cause of action, this answering defendant admits each and every allegation therein contained.

III.

Answering Paragraph IV of plaintiff's first cause of action, this answering defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph V of plaintiff's first cause of action, this answering defendant admits that the following named manufacturers have received from defendant the said reports designated Exhibit "A", and/or Exhibit "B" in said Paragraph III of plaintiff's first cause of action: American Furniture & Novelty Company, B. F. Huntly Company, Fine Arts Furniture Manufacturing Company, Caro & Upright, and Sanford Furniture Company; and this answering defendant generally and specifically denies each and every allegation set out in Paragraph V of plaintiff's first cause of action not herein specifically admitted.

V.

Answering Paragraph VI of plaintiff's first cause of action, this answering defendant generally and specifically denies each and [16] every allegation therein contained.

VI.

Answering Paragraph VII of plaintiff's first cause of action, this answering defendant generally and specifically denies each and every allegation therein contained.

VII.

Answering Paragraph VIII of plaintiff's first cause of action, this answering defendant generally

and specifically denies each and every allegation therein contained, and specifically denies that plaintiff has been made to suffer damages in the sum of Twenty Five Thousand Dollars (\$25,000.00), or in any other sum.

VIII.

Answering Paragraph IX of plaintiff's first cause of action, this answering defendant generally and specifically denies each and every allegation therein contained, and specifically denies that punitive damages in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum, should be imposed upon defendant.

Answering Plaintiff's Second Cause of Action, this answering defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of plaintiff's second cause of action, this answering defendant hereby incorporates by reference Paragraphs I through IV, inclusive, of its answer to plaintiff's first cause of action, as though the same were fully set forth herein and made a part hereof.

II.

Answering Paragraph II of plaintiff's second cause of action, this answering defendant denies, generally and specifically, each and every allegation therein contained.

III.

Answering Paragraph III of plaintiff's second cause of [17] action, this answering defendant de-

nies, generally and specifically, each and every allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's second cause of action, this answering defendant denies, generally and specifically, each and every allegation therein contained, and specifically denies that plaintiff has been damaged in the amount of Twenty Five Thousand Dollars (\$25,000.00), or in any other sum.

For A First, Separate, Distinct and Affirmative Defense, this answering defendant alleges:

I.

That at all times mentioned in said complaint, said defendant was and still is a partnership, authorized to conduct and engage in the business of a mercantile agency, under the laws of the State of California, and as such to compile and furnish to subscribers to its services, at their specific request, information of the history, standing and condition of business, person or persons, corporation or corporations, firms, association or associations, and that at all of said times defendant was and still is doing business under the fictitious name and style of Lyon Furniture Mercantile Agency, and that its said business was conducting the business of a mercantile agency by compiling and furnishing to its subscribers, on request, information of the history, standing, and condition of merchants, traders and others engaged in business within the limits of the United States, or elsewhere.

II.

That in pursuance of its said business as a mercantile agency said defendant, prior to and at the times set forth in said complaint was, and still is, employed as agent by many corporations, firms, associations and individuals, as subscribers, doing business in the United States and elsewhere, to ascertain and compile information of the history, estimated financial worth, and credit standing of corporations, firms, associations and individuals, doing business in said territory, and to furnish the same to said subscribers only upon request therefor.

That prior to and at the time mentioned in said complaint this defendant was and still is employed by said subscribers under the terms of a written subscription form or employment agreement with each of said subscribers, by which said subscriber agreed and agrees that said information was and is to be used solely for credit purposes and for the sole use, benefit and information of said subscribers in transactions involving the extension of financial credit by him, it or them, and that said information was and is to be communicated, and was and is to be held in strict confidence and never to be revealed to others than the subscriber so requesting.

III.

That prior to and at the times mentioned in plaintiff's complaint said defendant, in performance of its duty as agent and employee of its subscribers, as aforesaid, and at their special request to obtain a credit report as to plaintiff herein, em-

employed skilled and competent reporters and investigators to ascertain said information, and after due investigation from sources reasonably believed by defendant to be reliable, compiled said information in good faith and prepared the credit reports as set forth in plaintiff's complaint as plaintiff's Exhibits "A" and "B." Thereafter defendant sent the same on to those of its subscribers who had specifically requested said reports, in due course of defendant's business, in good faith, in confidence, and without malice, on a privileged occasion and as a privileged communication to interested subscribers.

IV.

That said reports to which plaintiff refers were not at any time published or delivered by said defendant except in good faith, [18] without malice, in strict confidence, to persons, firms, corporations or associations as subscribers interested in the subject thereof, at their request, pursuant to defendant's obligation to furnish same, solely for their information and use, and defendant had reasonable cause to believe and did believe the matters set forth in said reports to be true.

For A Second, Separate, Distinct and Affirmative Defense, this answering defendant alleges:

That the statements, and each of them, set forth in Exhibits "A" and "B" of plaintiff's complaint are all true, and were prepared and furnished to said firms so requesting said information from this defendant in good faith and without malice.

Wherefore, defendant prays that plaintiff take

nothing by her complaint and that defendant have its costs herein expended, and such other and further relief as may be meet and just in the premises.

CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
/s/ HENRY W. CATLIN,
Attorneys for Defendant. [19]

Affidavit of Service by Mail Attached. [20]
[Endorsed]: Filed Oct. 18, 1955.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS FOR DEFENDANT

It Is Hereby Stipulated and Agreed by and between William E. and Henry W. Catlin and Catlin & Catlin as the present attorneys of record for the defendant, Lyon Furniture Mercantile Agency, that attorneys William E. and Henry W. Catlin and Catlin & Catlin and Samuel A. Miller be substituted in their place and stead as attorneys for the defendant.

Dated: May 16, 1957.

WILLIAM E. AND HENRY W.
CATLIN AND
CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
Present Attorneys of Record.

The undersigned, the substituted attorneys of record for the defendant do hereby accept the em-

ployment and agree to become substituted as the attorneys of record for the defendant in place and in stead of the present attorneys of record. [21]

Dated: May 16, 1957.

WILLIAM E. AND HENRY W.
CATLIN AND
CATLIN & CATLIN AND
SAMUEL A. MILLER,
/s/ By SAMUEL A. MILLER.

The undersigned does hereby agree to become associated with William E. and Henry W. Catlin and Catlin & Catlin as one of the attorneys of record for the defendant in the above entitled action.

Dated: May 16, 1957.

/s/ SAMUEL A. MILLER.

The undersigned, Lyon Furniture Mercantile Agency, the defendant herein, does hereby agree to the substitution of attorneys as hereinabove set forth.

Dated: May 16, 1957.

LYON FURNITURE
MERCANTILE AGENCY,
/s/ By JOHN J. SIGERSON,
General Manager,
Defendant.

It Is So Ordered.

Dated: May 20, 1957.

/s/ THURMAN CLARKE,
U. S. District Judge. [22]

[Endorsed]: Filed May 20, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 14, 1957, and was continued until May 15, 1957, and thereafter until May 16, 1957 on which day it was submitted to the Honorable Thurman Clarke, judge presiding without a jury, a jury having been expressly waived, David G. Licht appearing as attorney for the plaintiff, and Catlin & Catlin by William E. Catlin and George L. Catlin appearing as attorneys for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

I.

That the plaintiff is a citizen and resident of the State of Arizona; that the defendant is a partnership doing [23] business under the common name and style of Lyon Furniture Mercantile Agency, in the State of California.

II.

That the allegations contained in paragraphs II and III of the amended complaint are true.

III.

That many of the allegations made in the reports set forth in paragraph IV of the amended com-

plaint, and prepared by the defendant about the plaintiff were false and untrue.

IV.

That the said reports were circulated to the persons set forth in paragraph V of the amended complaint except Frederick Cooper Studios, and to other persons unknown.

V.

That the defendant, acting by and through its duly authorized agents and servants, was grossly negligent in the preparation of the aforesaid reports in that then and there was in its possession information showing a substantially more favorable condition of plaintiff's business and of plaintiff's financial condition than was reported. The defendant was grossly negligent in the interpretation of the financial condition of the plaintiff as disclosed by the aforesaid statements and information then and there available to defendant.

VI.

That the allegations contained in paragraph VII of the plaintiff's amended complaint are true.

VII.

That the allegations contained in paragraph VIII are true except that the court finds that the plaintiff has been damaged in the sum of Two Thousand (\$2,000) Dollars.

From the foregoing facts, the court concludes:

Conclusions of Law

That the plaintiff is entitled to judgment against

the defendant in the sum of Two Thousand (\$2,000) Dollars.

II.

That the plaintiff is entitled to judgment for his costs and disbursements incurred or expended herein.

Let Judgment Be Entered Accordingly.

Dated: This 23rd day of August, 1957.

/s/ THURMAN CLARKE,

Judge of the District Court. [25]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 23, 1957.

United States District Court, Southern
District of California, Central Division

18445-T Civil

IRENE M. CARRIER, dba, Wishmaker House,
Plaintiff,

vs.

LYON FURNITURE MERCANTILE AGENCY,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Honorable Thurman Clarke, sitting without a jury, a jury having been specifically waived, on May 14, 1957, David G. Licht appeared as attorney for the plaintiff and Catlin & Catlin by William E. Catlin and George L. Catlin, appeared as attorneys for the defendant, and the court having heard the testimony and having examined the proof by the

respective parties and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

I.

That the plaintiff have judgment against the defendant in the sum of Two Thousand (\$2,000) Dollars, with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid. [26]

II.

That the plaintiff have judgment against the defendant for her costs herein in the sum of \$130.96. 9/16/57.

Dated: This 23rd day of August, 1957.

/s/ THURMAN CLARKE,

Judge of the District Court. [27]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed and Entered Aug. 23, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL
AND FOR AN ORDER DIRECTING THE
ENTRY OF A JUDGMENT FOR DEFEND-
ANT

To The Plaintiff Herein, and to David G. Licht,
Her Attorney:

Please Take Notice that on Monday, the 23rd day

of September, 1957, at the hour of 10:00 o'clock A.M. or as soon thereafter as the matter can be heard, the defendant will move the Honorable Judge Thurman Clarke, in his courtroom on the Second Floor of the Federal Building, Temple and Spring Streets, Los Angeles, California, for an Order vacating the judgment for plaintiff on Findings filed on August 23, 1957, which judgment was entered on August 23, 1957, for an Order granting a new trial to the defendant herein, for an Order amending the Findings of Fact and Conclusions of Law, and for an Order directing the entry of a new judgment in favor of the defendant, and for such other Order or Orders as may be proper and just.

This motion will be based upon the files, records, points and authorities to be filed, and the transcript of testimony heretofore taken in this action and on file in this proceeding, and upon the following grounds: [28]

a. Insufficiency of the evidence to justify the verdict or other decision in that there was produced no evidence by the plaintiff to prove that the reports complained of were issued wilfully and maliciously as alleged in paragraph VI of plaintiff's amended complaint.

b. Error in law occurring at the trial in that the Court failed to find as a matter of law that the reports alleged to have been issued by the defendant as alleged in Paragraph III of plaintiff's amended complaint and Paragraph VI of plaintiff's amended complaint and as set forth in defendant's first and

second affirmative defense were “qualifiedly privileged” under the law.

c. That the Findings are against the evidence which clearly shows in the transcript of the testimony.

d. That the Court has failed to find on material allegations both in plaintiff’s amended complaint and in the defendant’s answer in the following respects: The Court has failed to find and there is no finding with respect to the allegation set forth in Paragraph IV of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in Paragraph VI of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in Paragraph IX of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in defendant’s first and second affirmative defenses.

e. The Court erred in not finding that the communications were privileged and were published without malice.

f. There is no evidence to support the Finding that the defendant was “grossly negligent in its conduct” as found in Paragraph V of the Findings on file herein.

g. The Court erred in not granting the defendant’s motion requiring the plaintiff to file an undertaking as a condition precedent to the maintenance of this action for libel.

h. The Court further erred in not granting the

defendant's motion for a dismissal at the conclusion of the plaintiff's evidence.

Dated: September 3, 1957. [29]

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Defendant. [30]

Affidavit of Service by Mail Attached. [31]

[Endorsed]: Filed Sept. 3, 1957.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION FOR A NEW
TRIAL AND FOR AN ORDER DIRECT-
ING THE ENTRY OF A JUDGMENT FOR
DEFENDANT AND FOR AN ORDER
AMENDING THE FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The defendant's presents for the Court's consideration the following Points and Authorities in support of and in connection with its various motions set forth in the title to this document.

This is an action for damages resulting from an alleged libel to which the defendant has set up a defense of "truth" and "qualified privilege" and has denied any damages.

It is doubtless within the knowledge of the Honorable Judge before whom this matter is pending that a fellow Judge of the District Court of the

United States, to-wit, the Honorable Chief Judge Leon R. Yankwich, has written several books replete with points and authorities on the subject of libel. His latest work was published in 1950 and is entitled "It's Libel or Contempt if You Print It," and it is from this writing on page 308 thereof, that the following is respectfully called to the Court's attention:

"The defense of privilege under subdivision 3 of [32] section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts and without proving the absence of actual malice.

Furthermore, the proposition that one is not liable for damage, if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages. This is the established law in

many cases of privilege and no question is ever made about it.”

(The Code Section referred to is Section 47, subdivision 3 of the Civil Code of the State of California. The underscoring does not appear in the text but is used by counsel for emphasis.)

Again on page 313 of the same writing under the heading of “Privilege and Malice” it is stated:

“In each case (communications by or to interested [33] persons, reports of judicial, legislative or other public proceedings, or reports of public meetings) the privilege is dependent upon the absence of malice in fact.

Such malice in fact is not inferred from the communication or publication. Nor is it ever presumed.”

(The underscoring does not appear in the text but is used by counsel for emphasis.)

Counsel believes that with the foregoing basic principal of law in mind the Court will have little trouble in determining that from the points and authorities hereinafter set forth that the alleged libel in this case comes clearly within the qualified privilege of subdivision 3 of Section 47 of the Civil Code of the State of California, and that “malice is not inferred from the communication,” as is clearly set forth in Section 48 of the Civil Code of the State of California.

“Whether a publication is libelous on its face is a question of law.”

The question of privilege is one of law when the facts and circumstances under which a publication is made are not disputed.

Freeman v. Mills, 97 Cal. App. 2nd, p. 161 (p. 165 and 166).

On a motion for a new trial in an action tried without a jury the Trial Court may amend findings of fact and conclusions of law and direct the entry of a new judgment.

Federal Rules of Civil Procedure 59(a) 2.

See Rule 52(b).

By virtue of Rule 59(a) 2 the Court may completely reverse its prior judgment and give judgment for the opposing party if the evidence taken at the trial justifies it and if the motion raises only a question of law.

Phelan v. Middle States Oil Corporation, 210 Fed. 2nd, 360. [34]

Hutches v. Renfroe, 200 Fed. 2nd, p. 337.

The granting or denial of a new trial is in the sound discretion of the trial judge.

Somerville v. Capital Transit Co., 192 Fed. 2nd, p. 413.

In the event the evidence discloses a case of qualified privilege, malice is not presumed; and in order to state a cause of action the plaintiff must allege and prove malice.

Locke v. Mitchell, 7 Cal. 2nd, p. 599.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

In a late case decided in 1956 the Court stated as follows:

"In Oregon it is well established that there can be no recovery for a defamatory statement which is qualifiedly privileged, unless it was shown to have been made with actual malice."

Pomeroy v. Dun & Bradstreet, 146 Fed. Supp. at p. 59.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

It is a general rule that a mercantile agency's credit report to interested subscribers is qualifiedly privileged. In the case before the Court there can be no question but that the defendant is a mercantile agency (see the testimony of John J. Sigerson, the General Manager at page 228 to page 231 inclusive of the reporter's transcript of testimony on file herein. Also see the testimony of the plaintiff on page 50, line 21 to page 51 line 14), and in the case of Cullum dba Cullum Motor Sales v. Dun & Bradstreet, Inc., found in 90 Southeastern Reporter 2nd at p. 370 (which is a case of the Supreme Court of the State of South Carolina decided December 6, 1956), the Court said:

"The defense of qualified privilege is available to [35] a mercantile agency in respect to reports on credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter. Report by a mercantile agency to a subscriber who had requested information concerning financial condition of an automobile dealer was qualifiedly privileged, and although false, was not actionable in absence of malice."

To the same effect as the foregoing is the case of Watwood v. Stone's Mercantile Agency, Inc., 194 Fed. 2nd, 160 (Certiorari denied, 344 U. S. 821).

Malice is defined as ill will toward another, as evidenced by an attempt to wrongfully vex, injure

or annoy another. This malice may be designated either malice in fact or express malice. Malice is not inferred from the communication.

Civil Code State of California, Section 48.

Davis vs. Hearst, 160 Cal. 143 at p. 164.

Miles vs. Rosenthal, 90 Cal. App. 390.

In the instant case the Court found (Finding Number V) that the defendant was grossly negligent in the preparation of its reports and in the interpretation of plaintiff's financial standing. Said finding of gross negligence is not supported by the evidence and a finding of negligence does not destroy the defendant's qualified privilege.

"But the truth is that mere negligence or mere carelessness can never be evidence of malice in fact. In the same act they cannot even co-exist. Malice necessarily imports an evil purpose.

Negligence necessarily implies an absence of intent or purpose.

Mere inadvertence or forgetfulness or careless [36] blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true."

Davis v. Hearst, 160 Cal. 143 at p. 167 and at pages 172 and 173.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

The plaintiff's testimony in this action and the admissions of her counsel which appear at page 249 of the Reporter's Transcript, acknowledge the fact that at no time did the defendant nor any of its agents have evil motives toward the plaintiff or attempt to vex, annoy or injure her. It was the

undisputed testimony of plaintiff that at the time these reports were published she had no contact with the defendant or its agents (Reporter's Transcript, page 57).

It is respectfully urged that the Court should amend its Findings of Fact in the several instances set forth and referred to in the motion presently before the Court for a new trial, for a judgment and for amendment of Findings of Fact and Conclusions of Law.

That is specifically find that the communications set forth and referred to in the plaintiff's complaint and in the oral amendments made to the plaintiff's complaint made in Open Court were privileged communications on the part of this defendant.

That the Court further find that said privileged communications were published without malice in the light of the fact that the law does not presume malice in a qualifiedly privileged communication and in the light of the fact that nowhere in the evidence and as set forth in the Reporter's Transcript of the testimony herein does it appear by evidence from any source that the defendant was actuated by malice in submitting the reports which it did submit to interested parties who were members and subscribers by contract with the defendant as was stipulated to in Open Court at the time of trial, and finally;

That the Court in the alternative either enter a judgment in favor of the defendant as provided for by Federal Rule 59(a) 2, or grant the defendant's

[37] motion for a new trial and to amend the Findings in the particulars indicated.

Respectfully submitted,

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,

Attorneys for Defendant. [38]

Affidavit of Service by Mail Attached. [39]

[Endorsed]: Filed Sept. 11, 1957.

United States District Court, Southern District
of California, Central Division

No. 18445-TC Civil

[Title of Cause.]

MINUTES OF THE COURT

Date: September 24, 1957. At: Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge.

Deputy Clerk: E. J. Fisher; Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings: It Is Ordered that defendant's motion for new trial, heretofore heard and submitted September 23, 1957, be and hereby is denied.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

/s/ By E. J. FISHER,

Deputy Clerk. [40]

[Title of District Court and Cause.]

STIPULATION RE AMOUNT OF COST BOND
ON APPEAL AND SUPERSEDEAS BOND
AND ORDER THEREON (F. R. of C. P.
Rule 73 (c) - (d))

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel of record that the filing of a surety bond on behalf of the defendant herein, Lyon Furniture Mercantile Agency, in the sum of \$3,000.00 shall be considered as an amount sufficient to comply with Rule 73(c) (cost bond on appeal) and (d) (supersedeas bond) of the Federal Rules of Civil Procedure.

Dated: October 1, 1957.

/s/ DAVID G. LICHT,
Attorney for Plaintiff.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Defendant. [41]

ORDER ON FOREGOING STIPULATION

Upon reading and filing the foregoing stipulation
It Is So Ordered.

Dated: October 3rd, 1957.

/s/ LEON R. YANKWICH,
U. S. District Judge. [42]

[Endorsed]: Filed Oct. 3, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court,
and to Irene M. Carrier dba Wishmaker House,
Plaintiff, and to David G. Licht, Attorney for
the Plaintiff:

You and Each of You Will Please Take Notice
As Follows:

Notice Is Hereby Given that Lyon Furniture
Mercantile Agency, defendant above named, hereby
appeals to the United States Court of Appeals for
the Ninth Circuit from the final judgment entered
in this action on the 23rd day of August, 1957, in
favor of the plaintiff and against the defendant
for the sum of \$2,000.00 as damages, together with
interest from the 23rd day of August, 1957, and for
costs taxed under date of September 16, 1957, in
the sum of \$130.96, and from the whole thereof.

Dated: October 11th, 1957.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Appellant. [43]

[Endorsed]: Filed Oct. 11, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled matter:

A. The foregoing pages numbered 1 to 46, inclusive, containing the original:

Notice of Hearing and Motion to Require Plaintiff to file an undertaking and motion for more definite statement.

Minute Orders of Court—8/23/55 and 9/24/57.

Amended Complaint for Libel.

Answer to Plaintiff's Amended Complaint.

Substitution of Attorneys for Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion and Motion for a New Trial and for an Order directing the entry of a Judgment for Defendant.

Points and Authorities in support of Defendant's motion for a New Trial and for an Order directing the entry of a Judgment for Defendant and for an Order Amending the Findings of Fact and Conclusions of Law.

Stipulation Re Amount of Cost Bond on Appeal and Supersedeas Bond and Order Thereon.

Notice of Appeal.

Designation of Record on Appeal.

B. Plaintiff's Exhibits 1 to 16 inclusive. Defendant's Exhibits A to I, inclusive.

the Defendant: Catlin & Catlin, by William E. Catlin, George L. Catlin, 433 South Spring St., Suite 622, Los Angeles 13, California, and Meyer Lindenbaum, New York, New York. [1]*

The Clerk: Case No. 18,445-TC Civil, Irene M. Carrier, dba Wishmaker House vs. Lyon Furniture Mercantile Agency, for court trial.

Mr. Licht: Ready for the plaintiff.

The Clerk: Both counsel wish to move for association of counsel.

The Court: Yes. Do you want to move for association of counsel?

Mr. W. E. Catlin: If your Honor please, prior to that I would like to clear up a matter. I am informed the record does not reflect dismissal of the Second Cause of Action as we agreed in our stipulation in open court at the pretrial hearing. If this is correct, I would like the correction made, showing that cause number two was dismissed.

The Court: All right. Dismiss it.

The Clerk: It was dismissed.

The Court: Yes, before Judge Jertberg.

Mr. W. E. Catlin: Then, I have the motion.

The Court: All right.

Mr. W. E. Catlin: If the court please, I would like to move for the association for the defendant in this matter of Meyer Lindenbaum, attorney at law, member of the New York Bar and admitted to practice in the Federal Courts of [3] New York.

The Court: All right. I am very happy to have you.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Lindenbaum: Thank you.

Mr. Licht: Your Honor, I have a similar motion on behalf of the plaintiff, for the association of Otto Linsenmeyer, a member of the Arizona Bar and a member in good standing of the Federal Court.

The Court: All right. I will be very happy to have you.

You may proceed, Mr. Licht.

Opening Statement on Behalf of Plaintiff by
Mr. Licht

Mr. Licht: Your Honor, this case involves I believe a rather unique situation.

My client, Irene Carrier, is in business in Phoenix, Arizona, doing business under the firm name and style of Wishmaker House, which is a retail store for the sale of furniture and appliances. She took over sole possession of that store from herself and her husband who had been operating it theretofore, in 1953. At that time, and theretofore, she had been actively engaged in working in the store, being charged with the jobs of selling and buying and advertising. And her husband, who we expect the evidence will show was a man of considerable education in the field of finance, was charged with the job of financing and making the payments and paying the bills and so forth of the business.

Sometime in March or April of that year, 1953, Mr. [4] Carrier went on a cruise apparently for his health and did not return. The first knowledge that Mrs. Carrier had of his not returning was some few weeks later, when he notified her that he did not wish to return, indicating that their marriage should be terminated.

In the meantime, she had taken over full control of the business. And the very next day after her husband left, a man from what turned out to be one of the largest creditors said, "We have a large sum due, and what are you going to do about it?" And this Mrs. Carrier will testify was the first inkling she had that there was any kind of a financial problem at all, the business theretofore having been quite substantial and she having had no information whatever that there were any problems.

She made a hurried examination of the facts and determined that there were at that time some \$49,000 in outstanding liabilities, the great majority of which were not current but were from 60 to 90 or more days old.

Mrs. Carrier then determined that certain drastic steps would be necessary in order to get the business out of this predicament, and she proceeded to do just that. She made what arrangements she could. She obtained counsel immediately to help her examine the situation, and she began what appears in my mind to be one of the most amazing recoveries that I have ever seen in such a situation. [5]

In a period of approximately three months, she had reduced the outstanding indebtedness on these old bills, naturally paying whatever current bills were present, from approximately \$49,000 mentioned to some \$35,000, and she was still being pressed considerably by a number of creditors, particularly in view of the fact that information was then available to everybody that her husband was no longer on the premises, and he was active before that.

And so, and on advice of her attorneys and of the credit managers association in Phoenix, there was an arrangement made with the creditors which provided that Mrs. Carrier would pay \$16,000 that she had accumulated during the time when this deal was being negotiated, \$6,000 from another sale and \$10,000 from some funds that her husband had on deposit or were available in the bank, which was to be applied immediately to the balance of \$35,000, reducing it to some \$19,000, and that the balance of \$19,000 would be paid off at the rate of \$1,000 per month. And this I would like to stress the point was in continuing operation of the business. In other words, this money was having to be paid out of the sales on profits of the business, irrespective of the obligations to pay for the current merchandise that was being delivered. And she paid that. That was agreed to by all the creditors. She paid the \$16,000, and she paid several payments on the \$19,000 balance that was left, bringing that [6] down to about fifteen or sixteen thousand dollars.

By that time the spring of 1954 had arrived and as your Honor is perhaps aware of, that Phoenix business becomes very stagnant during the spring and summer months, because of the heat.

So she again asked the creditors to give her an extended amount of time to pay off the then balance of approximately \$16,000, or a moratorium of three months, which they agreed to do.

To make a long story short, during the next year she reduced these claims to about \$9,000, by many means which she can tell better than I. At the end of that period, she then owed a balance of \$9,000,

and on advice of both her attorney and the man from the credit association who will be a witness here sometime today, she determined to get some funds from her friends or another mortgage on her house or some such way to pay them off, and she ultimately settled this balance of \$9,000 for a payment of \$3,000, which would have been approximately two years after she took over complete control of the business.

In summary, it means that when she took over the business there were \$49,000 worth of debts, and in the period of two years, in addition to running her business and running her home and taking care of her children as she was then obligated to do, she paid off \$43,000 of the \$49,000 in old debts [7] that existed as old debts at the time of the operation of the business by her husband.

Now, as the court is also probably aware, there is in the furniture business the Lyon Furniture Mercantile Agency, the defendant here. Their job, their business is composed entirely of two facets. One is the collection facet in which they make certain collections on behalf of their customers who are generally the manufacturers in the furniture business, and the other is credit reporting. That is, when a manufacturer gets an order from a firm such as Wishmaker House, he gets in touch with Lyon and gets a report and determines from that report whether or not he should ship to them or whether or not he should extend them any credit. This seems to me to be a job which requires a great deal of consideration, and after all, entails the very lifeblood of a person's business.

If Lyon gives them a so-called bad rating, that is a rating which would require the manufacturer either not to ship to them or to ship to them on a C.O.D. basis, then, the person who has such a rating is almost unable to do business, for it seems rather obvious that if they can't get credit for at least during the period in which they themselves receive the money for the merchandise, they cannot continue to function as a business. And so, the reporting of Lyon's is of extreme importance to them. [8]

I wish to make it clear at this point that my client, Mrs. Carrier, was not ever nor is she now a member of Lyon's; that Lyon's have undertaken in pursuit of their business to make a report on retail people and in this case on my client, Mrs. Carrier, which it seems obvious is their privilege, it is their job, it is the way they are making their living.

The plaintiff's case, your Honor, is rather simple at this point. It is our contention that these persons, having undertaken to make a report on a person without any choice on their part, have a duty to that person to do it truthfully and honestly and sincerely, they have a duty to report what facts they know, be they good or be they bad.

The reports that Lyon put out on Mrs. Carrier during these years from '53 to the present are quite obviously bad as the record will show.

We will show by the testimony of the man who made the reports that he had substantial other information in his file that he did not disclose and still does not disclose today. That information we will also show, would logically be of interest to a man

who is questioning whether or not he should extend credit to this person.

That is all their duty is. Their duty is to disclose what facts they have to their customers and the customers determine whether they should pass credit to a prospective buyer or not. [9]

We will show that there was certain vital information which was withheld, the most vital of which was the very fact that this woman had undertaken to bring this business back from the depths that it was, that they knew it, because they had hired an attorney in Phoenix to represent certain members of their organization, who had proceeded with collections, that their collections were paid some six to nine months before several of the reports were made and they never disclosed that the payments were made. They made certain statements in there that she had no experience in the business, a fact which their own records disclose to be not true.

They further stated that she had hired a manager to operate the business, a statement which is also not true. She never had a manager. And that is important from the standpoint of a credit manager, because he could say to himself, well, here is a woman without any experience and she hired a manager to run it, there must be something wrong.

They knew that she had paid off these claims in the most amazing manner possible in a period of less than two years, that their clients had gotten almost a hundred cents on the dollar of every collection they had; they kept printing in their reports that they had matters for collection; they never once said that they had been paid.

And I will show detail after detail in the report [10] prepared by these people that there was information available and important to a credit manager in any firm, which was not there and it is my conclusion from that, that had they had that information, many of the manufacturers who refused to give her credit would have given her credit, and as a result she sustained damages.

Now, on the question of damage, your Honor, I am aware that we are in a field most difficult to determine.

We will have some evidence of the earnings of the business before this first report was brought out on Mrs. Carrier, and I am aware that there have been substantial changes in the business.

I am also aware that we are in a field which closely borders on the speculative.

However, Mrs. Carrier will testify as best she is able how much reasonably at a minimum business she could have done had she had a decent credit report, a credit report based on just what the facts were. She was in fact a slow pay during this period, there is no question about that, but the reason she was a slow pay was the reason that we feel had the credit people had a chance to see, they would have felt as I feel, that this was a woman who deserved a reasonable chance, some amount of credit, and I say, your Honor, there were only two manufacturers in the United States that continued to extend her credit, and this was because they knew [11] her personally, and any other manufacturer reading a report from Lyon's would not continue to extend

her credit, and I will introduce some evidence of that. As a matter of fact, I intend to have one witness who will testify that the rating they make in the book which in this case is a 13-6 rating for Mrs. Carrier would keep him from even making a call on her as an account. This is important, your Honor, in assessing damages.

The Court: Now, do you want to make an opening statement at this time?

Mr. W. E. Catlin: I will withhold it.

The Court: They will withhold their statement.

Mr. W. E. Catlin: Excuse me. I would like to present counsel with a trial brief.

The Court: All right.

Mr. Licht: I have already submitted my trial brief, your Honor.

The Court: All right, I have yours.

Mr. Licht: It was filed this morning.

IRENE M. CARRIER

plaintiff herein, called as a witness on her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your full name.

A. My name is Irene Carrier.

Mr. Licht: Will you speak up so we can hear you over [12] here, Mrs. Carrier.

Mr. W. E. Catlin: If your Honor please, I would like to ask permission of the court to address the court on a motion at this time.

The Court: Yes, sir.

Mr. W. E. Catlin: At this time, your Honor, the defendant moves that the complaint of the plaintiff

(Testimony of Irene M. Carrier.)

be dismissed as being defective in the following respects:

That, first, the publication alleged in plaintiff's complaint is not defamatory; that second, it being not defamatory on its face, under the code it requires an explanation or innuendo by pleading along with special damages; that in the one particular in which an innuendo is pleaded the complaint upon its face reveals that the matter is true. This, your Honor, is the matter of the divorce and marital difficulty. The plaintiff states in the complaint that the business was received as a result of a divorce, a decree.

Under California Civil Code 45A, you must allege and prove special damages as a proximate result of defamation which is not defamatory on its face per se.

In this case the only wording that the plaintiff complains of is (1) "That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress." Plaintiff admits that the business was obtained by a decree of court and the report states only that the business [13] was obtained through financial difficulty. (2) "that plaintiff had no previous retail furniture experience". This on its face is not defamation. (3) "that plaintiff employed a manager to operate said business". This again upon its face is not defamatory, as some of the best and finest businesses in the United States are run by managers for people. (4) "that 1954 payments were slow". This again is not defamatory on its face.

(Testimony of Irene M. Carrier.)

And "that the bulk of plaintiff's purchases are being made on a C.O.D. basis." This again without explanation is not defamatory.

These statements being read by any individual, not versed in technical detail but as is required by our law, the normal, ordinary, reasonable man, do not indicate defamatory nature of any kind.

And the complaint does not plead an alleged special damages of any nature.

Second, the complaint upon its face and by virtue of the two reports made a part thereof, indicates that Lyon Furniture Mercantile Agency is a credit reporting agency, and as such, by its very nature, and by the material contained therein falls within the purview of the qualified privilege granted mercantile agencies of this kind, both by the Civil Code 47, Sub. 3 and by cases in the State of California.

Section 48 of the Civil Code states that in this type of defamatory action malice is not presumed as it is in the other defamatory actions by the mere fact of publication but must be alleged in detail. And in this particular complaint, they merely say that the defendant did this with malice.

If your Honor please, the complaint shows that the Lyon Mercantile Agency is a credit reporting agency and as such is of the peculiar value to business that it has been bestowed with a qualified privilege in case of error, as long as there is no malice, personal ill will and malice involved.

This must be actual malice. As far as the complaint states upon its face, this actual malice is not

(Testimony of Irene M. Carrier.)

alleged and therefore, we urge that it cannot be proved.

Accordingly, we move that the complaint be dismissed at this time.

The Court: Well, I will deny the motion at this time. You may proceed to examine the witness.

Direct Examination

Q. (By Mr. Licht): Would you state your name please.

A. Irene Carrier.

Q. Can you speak a little louder, please, so we can hear you.

A. Irene Carrier.

Q. Where do you live, Mrs. Carrier? [15]

A. Phoenix, Arizona.

Q. Are you engaged in business?

A. Yes, I am in business.

Q. What is the name of the business?

A. The name of my store is called Wishmaker House.

Q. What business is that?

A. It is furniture and decorating, retail.

Q. How long have you been engaged in Phoenix in business?

A. Since 1946, but I didn't—I have been in the furniture business since 1948.

Q. I see. And what was the business called at that time?

A. Carrier's Furniture.

Q. And how long was it called Carrier's Furniture?

A. It was called Carrier's Furniture from July, 1946.

(Testimony of Irene M. Carrier.)

Q. Until when?

A. Until I changed the name when the lease expired and moved, which would be January of '54.

Mr. W. E. Catlin: I am sorry, counsel. I really can't hear her.

The Court: We have the air conditioner here which you have to compete with.

Mr. Licht: Speak up, please.

The Witness: Yes. [16]

Q. (By Mr. Licht): When did you first start working yourself at Carrier's Furniture?

A. I think May of 1948 I went into that store.

Q. And who else was in the store besides——

A. My ex-husband.

Q. And his name?

A. Frank; Frank Carrier.

Q. Frank Carrier. Did you and Mr. Carrier own this store? A. Yes.

Q. What was your job or position in the store say from 1948 to 1953?

A. Just about a little of everything. I took care of—I did most of the buying. The store had never made money until I went there. I got in and bought some decent furniture, started an advertising program, did a lot of mail advertising, to get people in.

Q. And were you actively engaged?

A. And sold and decorated.

Q. Were you working full time during that period, in the store?

A. Yes, I was. I was working twelve hours a day most of the time.

(Testimony of Irene M. Carrier.)

Q. Did that continue until March or April, 1953? A. Yes, it did. [17]

Q. And will you tell the court what happened there at that time that was of significance.

A. In April 1953?

Q. Yes.

A. I hate to go back and live all this over again.

The Court: Well, you have to.

Mr. Licht: Please.

The Witness: In April 1953, about the 10th of April, Mr. Carrier went on this cruise.

Q. (By Mr. Licht): Did he tell you why he was going on this cruise?

A. His health was very poor. He has a very wealthy brother-in-law and his brother-in-law had bought a cruiser and he was invited to go on this cruise throughout the Bahamas.

Mr. W. E. Catlin: I object, your Honor.

The Court: Well, she is just giving the background a little bit. I realize that statement doesn't help. She just wants to explain.

Mr. Licht: I just want her to explain the background of material facts.

The Court: That is right.

Q. (By Mr. Licht): What happened next?

A. He went on this cruise. There was no question of his not coming back in my mind when he left. [18]

Q. When he left, what was the next thing that happened?

A. Well then, a young credit manager from Ari-

(Testimony of Irene M. Carrier.)

zona Hardware called on me. I was with a customer. He had to wait quite a while. Finally I got around to him. He introduced himself. His name was Mr. Martin, and here we had about 7,500, 7,700——

Mr. W. E. Catlin: I object, your Honor, this is all hearsay.

The Court: Well, as to that I think I will have you lead her a little bit, Mr. Licht.

Mr. Licht: All right.

The Court: Some of that is hearsay there, but we have got the background.

Q. (By Mr. Licht): The day following when your husband left, somebody called on you from Arizona Hardware Company, is that correct?

A. Yes. I will put it bluntly and quickly for you. Phoenix is small. And the news got around very quickly that Frank Carrier had gone on a cruise. So they just simply all started folding in.

Q. And prior to that time were you aware of what the financial condition was of Carrier Furniture Company?

A. No. I paid no attention to the books at Carrier Furniture.

Q. Whose job was that? [19]

A. My husband took care of it, and he had a part time accountant, a bookkeeper.

Q. All right. Now, after you had this conversation with this man from Arizona Hardware, what happened next?

A. I talked with him and I told him I had a

(Testimony of Irene M. Carrier.)

feeling I was in a mess and I told him, I believe it was on Thursday, I said, "Go back and tell Mr. Jones," he is the manager of Arizona Hardware, "that as quickly as I can I will get some type of financial statement together for you people and I will be over the first of the week."

Mr. Lindenbaum: I object. This is all hearsay, your Honor.

The Court: I will consider it as partly hearsay. She is trying to give the background. We will get into the real merits of the litigation. There is no jury here. I will have to eliminate the portion that is hearsay.

Q. (By Mr. Licht): And then did you proceed to get a financial statement together?

A. A friend came in and did the best he could and got a financial statement together for me.

Q. That was your accountant?

A. No. I had no accountant at that time.

Q. Who was the man?

A. He was a man in Phoenix. Well, how I knew him, he had been coming in on his free time and setting up a [20] perpetual inventory control for me, and he had had years and years of credit experience. He had been credit manager with Doris Hyman over there for several years and with Paul Sale out in Mesa.

Q. At any rate, you had a statement prepared which gave you a list of whoever your creditors were at that time, is that correct? A. Yes.

(Testimony of Irene M. Carrier.)

Q. Do you remember approximately how many creditors were included on that list?

A. A good 60.

(A short intermission.)

Q. (By Mr. Licht): Let me show you a series of six or eight pages on the stationery of Carrier's Furniture on East Van Buren Street, Phoenix, and ask you to examine it and tell me whether or not that is a list of the creditors that existed at that time. A. Yes.

Mr. Licht: Could I have it marked for identification at this time.

The Clerk: Plaintiff's Exhibit No. 1.

The Court: Plaintiff's Exhibit No. 1.

Mr. Licht: No. 1 for identification, your Honor.

The Court: Yes. [21]

(Said document, consisting of eight pages, was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Licht): Now, what did you do next, Mrs. Carrier, with respect to the operation of this business?

A. I took that credit report Monday to Arizona Hardware. I sat down with their manager and I said, "This is the way it is." "Now, how am I going to pay these bills? What is the best way I can go about it, Len?" I knew him. And we worked it out, at my own suggestion that I would go on a C.O.D. basis and that I would knock that indebtedness down just as quickly as I could.

From there I went over to General Electric Sup-

(Testimony of Irene M. Carrier.)

ply, who was the next big creditor. They did not call me. I thought I would go first. I went over there and talked, and J. Paxton I met, their credit manager, and we worked out the same type of arrangement, I automatically went on C.O.D. and I would pay them just as quickly as money started coming in.

Q. What did you do in an effort to get some money in quickly to start payments?

A. Business was very poor. We had a sale toward the end of April. Then we had a big sale in early June.

Q. And what did you do with the funds you realized from these two sales?

A. Paid off as much as I could and kept the doors open.

Q. You applied that to the indebtedness? [22]

A. That's right, the first sale. The second sale, I had around \$6,000 which I put in escrow with Mr. Hill's organization in Phoenix.

Q. Who is Mr. Hill?

A. Mr. Hill heads our wholesale-retail credit organization over there. It is a national hookup.

Q. And by that time you had made some arrangements with him, is that correct?

A. Well, in the meantime we had called a credit meeting.

Mr. Lindenbaum: May I address the court?

The Court: Yes.

Mr. Lindenbaum: I would respectfully move to strike out all this testimony and I object to this line

(Testimony of Irene M. Carrier.)

of testimony on the ground that it is hearsay and it certainly is not binding on the defendant. She has testified to conversations which are immaterial to the issues in this case.

The Court: Well, I will deny the motion to strike. There is not any jury here and she is trying to give us the background. We will get into the merits of the case.

Mr. Lindenbaum: I respectfully except.

The Court: Yes.

Q. (By Mr. Licht): So that anyway you had made certain arrangements with Mr. Hill's organization, is that correct?

A. During the early part of June, around the 1st of [23] June, through J. Paxton, who was credit manager for General Electric Supply over there, a wholesale credit meeting was called for me.

Q. And did you go to that meeting?

A. Yes.

Q. And what action did you take as a result of that meeting?

A. In the meantime, Mr. Carrier had come back to Phoenix and when he came back he had a certain amount of Kennecott Copper stock, which he had at the Valley National Bank, he had borrowed money on it, and he was invited by Mr. Paxton to be at that meeting.

Q. At any rate, Mrs. Carrier, at the meeting the problems of Carrier Furniture were discussed, were they not, and as a result of that meeting what did you do?

(Testimony of Irene M. Carrier.)

A. Continued to fight away, Mr. Licht, and keep my doors open. And Mr. Carrier, during these meetings, promised to put up his stock.

Q. I am going to show you a document dated August 27, 1953 and ask you to examine it and to see if that is a list of the creditors and the amounts due at the time of that meeting.

A. That is right.

Mr. Licht: I offer that for identification as plaintiff's exhibit next in order. [24]

The Clerk: Plaintiff's Exhibit No. 2 for identification.

The Court: No. 2.

(Said document, consisting of four pages, was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Licht): And following that, what next occurred, Mrs. Carrier, with respect to the payment of these claims?

A. Well, it was most difficult for four long months, because Mr. Carrier promised to put up \$10,000, to the creditors in Phoenix early in June, at the first credit meeting, and he stalled them week after week, he stalled until finally, Wholesalers over there slapped a garnishee on this stock in July. We never received the money until around about the end of September when this credit agreement that you have was finally written up. That is when we received his money, but he had promised it early in June.

(Testimony of Irene M. Carrier.)

Q. And during that period was he active in the store at all?

A. No. He never came. I had an injunction against his coming into the store.

Q. And you actively operated the store yourself?

A. Yes.

Q. What then followed after this arrangement, what did you do next?

A. Well, we sweat the summer out. It was horrible. [25]

Q. The summer of 1953?

A. Yes, '53. My lease was expiring in December. I knew I either had to find something else or I had to just walk out, and there was a heavy inventory and there was a heavy indebtedness.

Q. Will you give the court your best recollection of how much the indebtedness was at that time?

A. By the time we made these payments in October, I think we had reduced that down to about \$21,000.

Q. How much was it at the time you took over the business?

A. It was \$49,000 when he left.

Q. So that between April when you took it over and the fall of 1953, you reduced to \$21,000, is that correct?

A. Approximately. I don't have the accurate figures.

Q. All right. Well, I believe Mr. Hill does have those figures, doesn't he? A. Yes.

Mr. W. E. Catlin: Objection.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: Objection, your Honor. May I object to counsel leading the witness and I move to strike the conclusion.

Mr. Licht: I will withdraw that question.

The Court: He has withdrawn the question.

Mr. Lindenbaum: What? [26]

The Court: He has withdrawn the question.

Q. (By Mr. Licht): Well then, you did move the store, is that correct, is that what you say?

A. Yes.

Q. When did you move the store?

A. The lease was expiring in December of '53, and I looked and I looked and I didn't have any place to turn, and finally had the opportunity of trading the equity in my home for a five room little house on East Camelback which had been zoned for business.

Q. Did you do that?

A. I did that, and then I tried and I tried in the City of Phoenix to raise \$2,500 in order to make a store out of it. Nobody talked to me. And finally my brother-in-law in California signed that FHA mortgage and I made a store out of it.

Mr. Lindenbaum: I move to strike out the answer as not involved in the issues in this case, as calling for a conclusion and as being incompetent.

The Court: Well, I will deny the motion to strike. I will let it remain. Some portion of it is, but she is trying to be explanatory, and I don't think it hurts anything. There isn't any jury here. I think Mr. Licht has almost covered it all in the opening

(Testimony of Irene M. Carrier.)

statement which she is relating and some of it is hearsay, and that part of it which is [27] hearsay the court will just have to put out of his mind. I think it is faster than to go back and strike out that portion, so I will just let it remain. So for the purpose of the record I will deny the motion.

Q. (By Mr. Licht): Did you then move your store? A. Yes, we did.

Q. When was that?

A. That would be January of 1954.

Q. Is the store still located at that same place?

A. Yes, it is.

Q. What next happened with respect to the payment of these claims?

A. As we made a big payment in October—in November of '53, this credit agreement was also drawn up and signed at the end of my divorce which was the end of September, and I entered into a credit agreement with my creditors that I would pay that indebtedness off at a thousand dollars a month, which I tried to do, I think I made three payments, but I couldn't do it, I couldn't do it because I was not on a C.O.D. basis. I want the court correct on that. I protected my manufacturers and I automatically put myself on a C.B.D. and what happened.

I had about five thousand dollars' worth of working capital. I would order things. And I would say, "Let me know when you are ready to ship and my check will be coming [28] right away." They would get my check. They would hold my check

(Testimony of Irene M. Carrier.)

three and four and five months before I would get merchandise.

Mr. Lindenbaum: Your Honor, may I ask that the time be fixed in connection with the holding of the check for three, four, five months?

The Witness: My attorney has files there, your Honor.

The Court: Yes.

Q. (By Mr. Licht): Would you give the court some specific instances when that happened and relate it to a particular time in question.

A. Oh, Sanford Furniture held money on me.

Q. When? A. During that interval.

Q. Would that be 1953?

A. We are getting into '54. Sanford Furniture held money in 1954 into 1955, until I stopped doing business with them.

Jamestown Table in New York City, in July of 1954 took something like it was between five and six hundred as I recall in advance and said they were ready to ship, and took three months and I got a letter from an attorney and then I finally got Marshall Field rejects when I finally got my delivery.

Q. Now, in January 1954 you then moved the store and [29] you said you had an arrangement where you were to pay a thousand dollars a month, is that correct, which you did for three months. Then, what did you do at the end of that three months period?

A. Well, I think we made our March payment

(Testimony of Irene M. Carrier.)

and we were just being squeezed, we just couldn't do it, so we wrote a letter to the industry and asked for a moratorium on that indebtedness, which was given to me.

Q. How long a moratorium did you get?

A. Three months.

Q. At the end of that three month period, then, did you commence making payments again?

A. Then we get into summer and I called Mr. Hill up in late June. I made a thousand dollar payment as I recall it after that. And then I called Mr. Hill up in June, late June. A payment was due by the 14th of July and I said to him, "Frank, I simply can't make a thousand dollar a month payment during this heat. I can send you five hundred."

Q. You said that would be in 1954?

A. That would be in 1954.

Q. That would be in the summer of 1954?

A. Correct.

Q. Go on. You offered to make a payment of \$500.

A. And he said, "Irene, that will be all right. You are doing the best you can do. I am sure it will be all right." [30]

Q. Did you send the \$500? A. Yes, I did.

Q. What happened next?

A. I came to the San Francisco market. I returned to Phoenix, I was only there a few days. And Friday of that week, I had two sheriff's deputies come in with an execution for three judgments

(Testimony of Irene M. Carrier.)

against me—Sandhill Furniture, Dixie and Englander Mattress.

Q. And who was handling those claims for the claimants, if you know?

A. Those were claims that were handed over to Lyon's Mercantile, and they were represented by their attorney over there, their attorney, collection attorney is Mr. Wilson, and what happened, Mr. Wilson turned back the payment from Mr. Hill's organization and tried to move in.

Mr. Lindenbaum: I object. This is purely hearsay.

The Witness: That is the truth.

The Court: Yes; I mean I think I will strike that last statement out. Mr. Licht, you are getting into a little hearsay, you understand that.

Mr. Licht: Yes, your Honor.

The Court: I have been ruling with you, but I can't go too far. What they object to is that sometimes you make statements that are hearsay. You do not understand that, probably. It is a legal term.

The Witness: No, I don't. I am doing the best I can.

The Court: I know you are doing the best you can and I have to act legally. You don't know legal terms. I will ask Mr. Licht to direct you.

Mr. Licht: I will, your Honor.

Well, while we are looking for these papers, Mrs. Carrier—

The Court: We can stop and take the morning

(Testimony of Irene M. Carrier.)

recess at this time. You have made pretty good time.

Mr. Lindenbaum: If your Honor please, may I ask to speak——

The Court: Certainly.

Mr. Lindenbaum: My associate Mr. Catlin waived the opening. I think it would only be fair to the defendant if we are permitted to just take two or three minutes.

The Court: At this time?

Mr. Lindenbaum: At this time.

The Court: All right. Do you want to step down, Mrs. Carrier. We will take the morning recess but we will let the defense counsel make the defense statement at this time.

Mr. Lindenbaum: If your Honor please, we will show——

The Court: I understood he was going to wait and make it at the beginning of the defense, but you think you better alert the court right away?

Mr. Lindenbaum: Yes.

The Court: He didn't waive it. I thought he just [32] reserved it.

Mr. W. E. Catlin: That is right.

Mr. Lindenbaum: I would like to call the court's attention to the fact that this defendant, the Lyon Furniture Mercantile Agency, was established in 1876 and has offices in the principal cities of the United States and publishes reports on hundreds and thousands of dealers throughout the United States.

(Testimony of Irene M. Carrier.)

I would like to call to the court's attention further the fact that in our report we will show there was no personal feeling in connection with this individual; that we exerted every reasonable caution that our subscribers would require of us; that our only duty was to the subscribers and not to this plaintiff, and that we will show that Mrs. Carrier did pay her bills exceedingly slow; that she was on a C.O.D. basis, and that anything we said of her in our report was substantially true.

That is all.

The Court: We will take a short morning recess.

Mr. Licht: Thank you, your Honor.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Licht): I believe when we recessed, Mrs. Carrier, you had testified something about a moratorium of three months, is that correct? [33]

A. Yes.

Q. And that thereafter you had made a payment to this credit association of some \$500, is that correct? A. That is right.

Q. Instead of a thousand dollars as called for. Then you said something about going to San Francisco and coming back?

A. Yes. I was back two or three days when these two sheriff's deputies came in with an execution.

Q. And do you know what manufacturers they represented?

A. Yes. It was Englander Mattress Company, Dixie Furniture and Sandhill Furniture.

(Testimony of Irene M. Carrier.)

Q. And what did you do?

A. What did I do? Well, for the first time in 15 months, I exploded. I had a good crying jag.

Q. What did you do then?

A. My attorney was in court.

Mr. Lindenbaum: Your Honor, I move to strike out that answer as a conclusion.

The Court: All right. It may go out.

Mr. Lindenbaum: Thank you.

A. My attorney was in court. It took us a little while to get him. We finally got him. He in turn got in touch with Mr. Wilson's office and talked with Mr. Waddell.

Mr. W. E. Catlin: Objection as hearsay. [34]

Mr. Licht: Just testify to what you did, Mrs. Carrier.

The Court: Yes, I will sustain the objection.

Mr. Licht: Not as to what somebody else did.

Q. You got in touch with your attorney, is that correct? A. Yes.

Q. What did you do next? Did you make then any kind of an offer? A. No.

Q. With respect to their claims?

A. Mr. Waddell told me over the telephone——

Mr. Lindenbaum: I object to her testifying to what someone else told her over the telephone, as being pure hearsay.

The Witness: I have to tell what happened.

The Court: Well, I will let her go ahead. I will overrule the objection. Go ahead and answer. All right, go ahead.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: We respectfully accept.

A. Mr. Waddell told me over the telephone if I would personally——

Q. (By Mr. Licht): Who is Mr. Waddell?

A. Mr. Waddell in Mr. Wilson's office, his assistant I assume, he told me over the telephone if I would personally put in the mail a check for the difference that was coming to [35] Lyons Mercantile, they got that pro rata share out of that five hundred, but if I would put up the difference on the other five hundred, it would be all right, which I did.

Q. What happened then?

A. Tuesday the sheriff's deputies were back again. Mr. Wilson turned back Mr. Hill's check and he refused my check.

Q. What did you do next?

A. Mr. Wilson told my attorney that if——

Mr. Licht: Please don't, Mrs. Carrier——

Mr. Lindenbaum: If your Honor please——

The Court: That may go out.

Mr. Lindenbaum: What?

The Court: That statement may go out. He is going to ask another question.

Mr. Licht: I will ask you another question. I want just what you did.

Q. After these checks were turned back, what did you do?

A. I phoned the three manufacturers, the three whom I am talking about.

Q. You phoned them directly, is that correct?

(Testimony of Irene M. Carrier.)

A. Yes.

Q. And what happened as a result of that conference with them? [36]

A. Englander Mattress, I talked with Mr. Hirsh-meyer in Chicago.

Q. He is with Englander Mattress?

A. He is the credit manager for Englander.

Q. Just tell me what happened after the conversation?

A. I called him and they withdrew. They would have no part of it.

Q. At any rate, the sheriffs left?

Mr. Lindenbaum: I respectfully move to strike out that answer as being absolutely a conclusion.

The Witness: I have to tell the truth.

Mr. Lindenbaum: What she says someone told her. We haven't got an opportunity to rebut that.

The Court: All right. That part may go out.

The Witness: All right, Mr. Licht. Englander withdrew.

Q. (By Mr. Licht): At any rate, the sheriffs left, is that right? A. Yes.

Q. After your conversation. And following that, what did you do next?

A. Went ahead and tried to run my business.

Q. Now, at the time that these claims were being handled by Mr. Wilson that you mentioned, approximately how much was due to the group that he represented, at that time, now? [37]

A. At that time, I think about \$1,500.

(Testimony of Irene M. Carrier.)

Q. How much was due in total to all creditors at that time?

A. Probably between fifteen and sixteen thousand dollars.

Q. Now, what did you next do, if anything, with respect to just these claims being handled by Mr. Wilson?

A. I didn't do anything. I just continued my business.

Q. Did you subsequently make them some sort of an offer with respect to their claims?

Mr. Lindenbaum: Your Honor, I object to the question. The witness has already answered it. She said, "I didn't do anything."

The Witness: At that time——

The Court: All right, I will sustain the objection. Start again, Mr. Licht.

Q. (By Mr. Licht): Well, what next happened, if anything, with respect to these claims?

A. At that time my attorney was going on his vacation, and through him we offered fifty cents on the dollar on those \$1,400 claims that Lyon's Mercantile were holding, which they refused.

Mr. Lindenbaum: Your Honor, again I have to move respectfully to strike out that answer. She refers to "they". We don't know who she is talking about. [38]

The Court: I will let it remain. You can cross examine her on it and get the details then.

Mr. Licht: I will ask her, your Honor.

(Testimony of Irene M. Carrier.)

Q. To whom was this offer conveyed, so far as you know?

A. To Mr. Wilson. Mr. Linsenmeyer made the offer.

Q. And what did you do next with respect to this \$1,400 in claims?

A. In the meantime I went along for two or three weeks running my business. He was gone. He returns from his vacation and he phones me, and he had a letter on his desk that he read to me, from Mr. Wilson.

Mr. Licht: Please do not go into that. All I want to know is—let us follow along. With respect to the payment of these \$1,400 claims, now, which if any of those did you pay in full?

A. In a few weeks there we paid off the Sandhill and the Dixie judgment in full.

Q. Within a few weeks after this time the sheriff was in? A. Yes.

Q. And how much approximately did that then leave of this group that were handled by Mr. Wilson?

A. Probably around four or five hundred dollars.

Q. And what did you do with respect to those four or [39] five hundred dollars?

A. Then, most of those were settled for fifty cents on the dollar there in the fall, about \$400 was settled for around \$200. That is close.

Q. Now, with the exception of this, then, that \$400 which was settled for \$200, did you from the

(Testimony of Irene M. Carrier.)

time you took over this business until the end of '54 at this point make any compromise settlement with any creditors?

A. No, I did not, other than that.

Q. And had you to that time paid each and all of the creditors their pro rata share in full?

A. Just as much as I could.

Q. And how much then was left owing after you had settled with this group represented by Mr. Wilson?

A. I can't remember all those figures, but I would say then we probably had left about \$12,000, somewhere in there. Mr. Hill will have all those figures.

Q. With respect to this \$12,000, now, what did you do as to that?

A. Went on trying to pay until finally in about the end of January, which would be in 1955, wouldn't it——

Q. Yes.

A. ——we offered 3,000—I had gotten that indebtedness down to \$9,700 by then, and we did offer, through Mr. Hill's organization, a \$3,000 settlement, all of which was [40] accepted except for three people and I have forgotten their names, that was about \$700. They wanted a hundred cents on their dollar, and over a period of time I made those payments to Mr. Hill and they were paid their hundred cents on their dollar.

Q. Then, is it your testimony that between April of 1953, when you first took over complete operation

(Testimony of Irene M. Carrier.)

of the business, and January or February of 1955, you had paid all of your creditors in full with the exception of one group which got a \$200 balance instead of \$400, and some \$6,000 for the general overall creditors?

Mr. Lindenbaum: One minute, please. I object to the question on the ground that there are some statements made there that this witness has not testified to. That creditors were paid in full is one. She has not testified that creditors have been paid in full.

Mr. Licht: I believe that is what the question was, your Honor.

The Court: Well, I will let it remain. I will overrule the objection.

Mr. Licht: Will you answer the question.

The Witness: I am sorry. Would you repeat it for me, please?

Mr. Licht: Will you read it, Mr. Reporter.

(Pending question read by the reporter.)

The Witness: I don't understand your wording on that.

Mr. Licht: All right. I will try to change the question.

Q. When you took over in April, there was some \$49,000 in claims, is that correct?

A. That is true.

Q. How much of that obligation had you paid by January of 1955?

A. It was paid down to about \$9,700.

Q. And that amount, then, was settled how?

(Testimony of Irene M. Carrier.)

A. For \$3,000, with the exception of about \$700 in there where three parties wanted a hundred cents on their dollar, and they were later paid.

Q. Now, since you have been operating the business, have you employed a manager?

A. Never.

Q. When was the last time that Carrier Furniture Company had a manager, if you know?

A. Mr. Carrier had a manager whom he let go, I would say about January of '52 he let him go.

Q. And after that, there was never a manager?

A. No.

Q. Did you in August 1954 offer creditors a 50 per cent compromise settlement both on open accounts and those accounts that were in judgment?

A. No, I did not. [42]

Q. Mrs. Carrier, do you have any way of estimating—of course I just want to know if you have any way of estimating the amount of business that you have been unable to get since March of 1954 because of your inability to get credit?

A. The best way I could give you that is to——

Q. Well, do you have any way of estimating it?

A. Yes.

Q. Now, will you please tell me what way you have of estimating that, before you give me any figures.

Mr. Lindenbaum: I object to the question as calling for speculation and operation of the witness's mind.

The Court: Well, I will overrule the objection.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: I respectfully except.

Mr. Licht: Now answer my question, please. What method have you for estimating that?

A. I would go back and compare a comparable inventory on East Van Buren and what we did the first year I was there with a less—with about comparable inventory, and when I went into that store in May, there was less than \$8,000 inventory.

Q. In May of what year is that, now?

A. Either '48 or '49, and when we closed our books, my husband said we net \$19,000. We built that volume up. We were keeping the overhead low and we were doing business, and doing a nice business.

Q. And at that time, before 1953, had you been purchasing generally on an open account?

A. Oh, always.

Q. And as a matter of fact——

The Witness: Nobody had turned me down.

Q. Now, using your best estimate, based upon your knowledge and experience in Carrier Furniture before that, will you tell the court your best minimum of what amount of business you lost as a result of not getting credit?

Mr. Lindenbaum: I respectfully object to the question as being incompetent.

The Court: I will overrule the objection.

Mr. Lindenbaum: We respectfully except.

A. I would say, Mr. Licht, with the traffic that we have had and the way the store is liked and my personal reputation in the city, at a minimum that

(Testimony of Irene M. Carrier.)

store should be netting twelve to fifteen thousand a year.

Q. (By Mr. Licht): How much, in fact, have you been netting during the last few years?

A. We have been running in the red.

Mr. Lindenbaum: I again renew my objection and move to strike out the answer as not binding on the defendant and as not being the best evidence. [44]

The Court: No. I will deny the motion to strike.

Mr. Lindenbaum: We respectfully except.

Q. (By Mr. Licht): Could you tell me a little more specifically, if you can, on what you base this, in other words, do you have any specific references that you can think of in cases where you know you lost business? A. Yes, very definitely.

Q. Will you please tell me some?

A. Time and time again. My business mostly is a referral business and people come to me because a friend has sent them, and I can't get them things. A specific incident just within the last few months—I will give you two. I did Mr. Vincent's house over there and he is executive vice president for the Bank of Douglas, at the head office. I had done a bank job previously for that, downtown for them, and then I did his house. Every bit of buying that he possibly could do he wanted to do through me and he did it through me with the exception of a Baker desk he bought and paid \$400 for at Doris Hyman's. I cannot go out and buy Baker. I can't go out and buy Widdicomb.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: I move to strike the answer.

The Court: Well, the fact that she cannot buy from Baker and Widdicomb, I will let that portion go out. The rest will remain.

A. Recently I have had several of their personal friends [45] come in to me because they are very well known in the state, wanting me to go ahead and take over, but I can't get things.

Q. (By Mr. Licht): In response to inquiries, Mrs. Carrier, that you made to certain manufacturers for purchases, did you receive responses from them stating why they wouldn't ship to you?

A. Some. Some, no.

Q. Do you recall offhand some that were mentioned to you, the question of not being able to ship because of——

A. Yes. We will take Sanford Furniture who had quite a bit of business from me.

Mr. Lindenbaum: Your Honor, I did not hear that question.

Mr. Licht: I am sorry.

(Mr. Licht shows documents to defendant's attorneys.)

Q. (By Mr. Licht): Now Mrs. Carrier, I am going to show you a series of five letters, two of them on the stationery of Sanford Furniture Company, one on the stationery of Caro & Upright, one on Fine Arts Furniture Manufacturing Company's and one on Charm House, Inc., and ask you if those are letters you received in response to certain orders that you had sent to those firms?

(Testimony of Irene M. Carrier.)

A. That is right.

Mr. Licht: Will you answer so they can hear.
Are these the letters? [46] A. Yes.

Mr. Licht: I offer those as one exhibit, your Honor.

Mr. Lindenbaum: If your Honor please, I object on the ground they are not the best evidence, they are hearsay and we have no opportunity to cross examine.

Mr. Licht: Your Honor, these are letters received in the general course of business by Mrs. Carrier.

The Court: I will let them be received. I overrule the objection.

Mr. Lindenbaum: I respectfully except to the ruling.

The Court: Yes. I overrule the objection.

The Clerk: Plaintiff's Exhibit No. 3, in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. Licht: I haven't anything further, your Honor. You can cross examine.

Cross Examination

Q. (By Mr. W. E. Catlin): Mrs. Carrier, I believe you stated under direct examination that at the time you took over Carrier's Furniture, now Wishmaker House, you had liabilities of approximately \$49,000, is that correct?

A. Yes, that is true.

(Testimony of Irene M. Carrier.)

Q. Now, Mrs. Carrier, what were the assets of Carrier's Furniture at the same time? [47]

A. As nearly as we could judge, around \$70,000 worth of inventory, plus our paid up equipment.

Q. In other words, you not only took over \$49,000 in liabilities but \$70,000 in assets?

A. That is right.

Q. Now, at the time you took over the business, in respect to these liabilities, what was the nature of the \$49,000 liabilities, were they trade accounts?

A. Most of them.

Q. And when had these been incurred, if you know?

A. Oh, some of them went back to December.

Q. December of what year

A. Well, that would be '50—ending '52, wouldn't it?

Q. '52, in other words, they were approximately six months old at that time?

A. They weren't six months. That is three months, January, February, March to April 10, a little over three months.

Q. I might be in error, Mrs. Carrier. I understood you to say you took it over in June.

A. I had to take over on the 10th of April, from the minute that I was left there stranded.

Q. I erred. The 10th of April. Now, Mrs. Carrier, in this \$49,000 of liabilities, do you recall what were the original terms on which the merchandise was sold to you? [48]

A. As any manufacturer sells, two per cent ten,

(Testimony of Irene M. Carrier.)

end of month some of them give. Very few factories will pressure you very much if you are 60 days, if you are doing a volume of business with them.

Q. Two per cent ten, net 30, is that correct?

A. Well, they work differently.

Q. Some of them were two per cent, ten, net 30. What were the others, as nearly as you can recall?

A. Well, that is just about how the industry does business. Some manufacturers, for instance, when they say "two per cent ten" they will give you until the 10th of the following month on an invoice and take your discount. Some want their discount within ten days. There are very few factories, I say if you are doing business with them, they don't pressure you on an account even if it is 60 days. They might write you a nice little letter saying you owe it.

Q. I see. But, in any event at least a portion of this \$49,000 would have been beyond the original terms, is that correct?

A. Yes, I would say so.

Q. Could you give me an estimate as to how much was beyond the original terms of sale, at that time?

A. No, I can't. There was only one invoice that I can recall that went back into December, and that was a part invoice from D. N. & E. Walter. However, we were quarreling [49] about that invoice and that invoice was not being paid on purpose.

(Testimony of Irene M. Carrier.)

Q. Were these debts paid in 1953, all of them?

A. Just as much as I could, Mr. Catlin.

Q. Were they all paid in 1954, the \$49,000?

A. As much as I could pay.

Q. Were they all paid, do you recall?

A. No. The settlement was finally made in about February of 1955.

Q. In other words, some of these obligations which you took over, which were delinquent under the original terms of sale at the time you took over the business, were not actually cleared until 1955?

A. That is right.

Q. Now Mrs. Carrier, do you know the type of business that Lyon Furniture Mercantile Agency is engaged in? A. I used to think I did.

Mr. W. E. Catlin: Well, I move to strike that as non-responsive.

The Court: Yes. That may go out.

Q. (By Mr. W. E. Catlin): Do you know, Mrs. Carrier, the type of business the Lyon Furniture Mercantile Agency is engaged in, of your own knowledge? A. Yes. It's credit.

Q. Credit. By that you mean that they write credit reports? [50]

A. They are a credit reporting agency, as far as I know, and a collection agency.

Q. It is a credit reporting agency?

A. And a collection agency.

Q. And are you at all familiar in your dealings as a retail furniture businesswoman with the methods under which they operate? By this I specifically

(Testimony of Irene M. Carrier.)

mean that they have subscribers to their business?

A. I know you have subscribers, yes.

Q. And do you also know of your own knowledge that to get a report from the Lyon Company you must be a subscriber to their services?

A. That is what I am told.

Q. Mrs. Carrier, do you know Adalaide J. Lyon?

A. Who?

Q. Adalaide J. Lyon.

A. Never heard of him.

Q. Do you know Fred Eshelman?

A. Never heard of him.

Q. Clare Nevers?

A. Never heard of him.

Q. John Graham? A. No.

The Court: A little louder. [51]

The Witness: No.

Q. (By Mr. W. E. Catlin): Frank Gaffney?

A. No.

Q. Margaret Lyon? A. No.

Q. Or John J. Sigerson?

A. You mean Sigerson?

Q. Yes.

A. I met Mr. Sigerson a year ago when he called on me.

Q. What was the date of that meeting?

A. It was Decoration Day, a year ago.

Q. Had you ever met him before that time?

A. No.

Q. Had you ever communicated with Mr. Siger-

(Testimony of Irene M. Carrier.)

son or any of the members of the Lyon Company that I have just previously named?

A. I have tried to communicate with Lyon's Mercantile here in Los Angeles but I don't—

Q. No. I am limiting my question to the people whose names I have given you, at this time.

A. Not with these people.

Q. You had no dealings with them at all—

A. No.

Q. —until you met Mr. Sigerson last Decoration Day?

A. Not to my knowledge. I might have met some of them [52] and not know who they are.

Q. And you never met—

A. Excuse me a minute.

Q. Yes.

A. Mr. Sigerson brought somebody with him, a year ago from Chicago, but I don't recall his name. It might be on that list.

Q. No, ma'am. Did you ever meet and discuss your business with any Lyon Furniture Mercantile Agency personnel prior to the issuance of the first report of which you complain in your complaint?

A. That report that we have is dated 1954, is it not?

Q. Yes, ma'am.

A. In March of 1954—I have copies of a letter there—I sent you people a financial statement and I asked for an interview in Phoenix.

Q. All right, but Mrs. Carrier, did you ever have any dealings with any of the Lyon personnel, either

(Testimony of Irene M. Carrier.)

with members of the firm or an employee, actually sit down, write and receive an answer, have any discussion with them of any nature prior to the publication of the report?

A. I don't know just when your report is dated. But in April of 1955, it would be——

Q. No. I am speaking of prior to the date of the first report, which is March 23, 1954. [53]

A. I got to stop and think a minute. The only contact I had with Lyon's Mercantile up until two years ago was when one of your representatives came into my store after I had moved, I would say in the spring, early spring, possibly March, February of 1954. He wasn't in the store two minutes. He wanted a report out of me and I told him very sweetly that I was sorry, that I had no information for him, that all credit information was available from Mr. Hill's organization, that's credit, too.

Q. But you had no discussion of your business——

A. No.

Q. ——or of any kind with any Lyon party——

A. No.

Q. ——or employee, of any nature, prior to then?

A. No, not until later.

Q. Now, did the Lyon Agency as an entity have ill will against you?

A. I didn't think so at the time. I think so, now.

Mr. W. E. Catlin: I am not asking you what you think, ma'am. I want to know, did they have any?

Mr. Licht: Your Honor, I think the question itself calls for what she thinks.

(Testimony of Irene M. Carrier.)

The Court: Yes.

Mr. W. E. Catlin: Perhaps it does call for a conclusion.

The Court: Counsel is going to withdraw the question. [54]

Q. (By Mr. W. E. Catlin): Did any member with whom you have ever had contact, any person associated with the Lyon Agency that you have had personal contact with, have they ever expressed or have they had ill will against you?

A. Do you mean do they come out and tell me personally?

Q. No. I am asking you if they had ill will against you.

A. I assume that you have a great deal of ill will, from these reports.

Q. Not what you assume. Do you know?

A. It is obvious.

Q. Do you know?

A. Yes, I know. You couldn't print those reports without ill will.

Q. Then, can you tell me who as an individual or which individuals have this ill will against you?

A. That I don't know.

Q. Now, I believe you stated just a moment ago, Mrs. Carrier, that last Memorial Day, you said—

A. Decoration Day.

Q. —Decoration Day, that you met for the first time Mr. John J. Sigerson?

A. That is right.

Q. When, if ever, have you had any other con-

(Testimony of Irene M. Carrier.)

tact, personal contact with a member of the Lyon Agency? [55]

A. We will go back. In April, in April of 1955 I had a business trip over here to the coast. I had written your organization previously. I had asked for an interview in the City of Phoenix. I sent a financial statement. The letter is there.

Q. Do you know that date that you asked for the interview?

A. Yes, sir. There are copies of letters there. It was in March, and we sent a financial statement and it was ignored. I had to come over here on a business trip at the end of April, so I thought if they won't come to me I will go to them. And I called Mr. Abernathy before I left Phoenix, because I wanted to talk with Mr. Abernathy. Mr. Hill had talked with Mr. Abernathy.

Q. Who is Mr. Abernathy, Mrs. Carrier?

A. I don't now what his position is over here. I think he is in charge of collections.

Q. He is an employee of Lyon Agency?

A. Yes, unless you have fired him.

Q. At least, let us say it was this way, at the time you are speaking of, Mr. Abernathy was employed by the Lyon Agency?

A. That is right, and I believe he was in charge of collections.

Q. And did you have an appointment with Mr. Abernathy? [56]

A. Yes. I phoned before I left Phoenix.

(Testimony of Irene M. Carrier.)

Q. And this interview or appointment was on what date?

A. Approximately—I can't give you the exact date—probably the 28th, somewhere in there, of April of 1955.

Q. 1955, approximately April 28th. Have you ever had a further interview with any member of the Lyon Agency, other than the meeting with Mr. Sigerson—

A. No.

Q. —that we just spoke of? A. No.

Q. Was anybody other than Mr. Abernathy present at the meeting you had with him?

A. Yes, for part of the time, but I don't recall his name. He was brought into the room and he was introduced as a Phoenix representative, but I don't know his name. He didn't stay during the whole conversation.

Q. You assume that he was a member of the Lyon Company?

A. He was introduced to me as being the Phoenix representative for Lyon Mercantile.

Q. All right. Beyond these three people, one that you can't identify, one identified as Mr. Abernathy, and one identified as Mr. Sigerson, you have never had any contact with any other member of the Lyon Company?

A. No, sir, I have not.

Q. Now Mrs. Carrier, would you tell me which of these [57] three, if any, have ill will against you?

A. I don't think personally, if you want to break them down individually, that they have ill will towards me. I think as an organization you

(Testimony of Irene M. Carrier.)

are doing the wrong thing and printing the wrong thing. I have to judge you by what you do, not by what you say.

Q. Now Mrs. Carrier, are you not a registered nurse?

A. Yes, I am a registered nurse.

Q. When did you become owner of the Carrier Furniture Company?

A. When the divorce decree was final in September of 1953.

Q. Now, at this time you took over complete control and ownership of the company?

A. Right.

Q. But I believe you stated you actually assumed direction of the company on——

A. April 10th.

Q. ——April 10th. And as I recall your direct testimony, you stated that you had spent at least a part of your time being active in the business since 1947.

A. No. I said either '48 or '49.

Q. '48 or '49?

A. Right. I went in, in May.

Q. Now, have you ever been active in your profession [58] as a registered nurse?

A. Not for over 20 years. I love furniture and I am in it.

Q. Not for over 20 years.

A. I am registered, however, in the State of California.

Q. Now Mrs. Carrier, at the time that you started to contribute to the business as set forth in

(Testimony of Irene M. Carrier.)

your direct examination, did you have any children? A. Two.

Q. And assuming that it was 1948 or 1949, what would their ages have been at that time?

A. My boy was around seven years old and my girl around 13—I guess eight on the boy.

Q. Eight?

A. Somewhere in there, hitting eight, close enough.

Q. Now Mrs. Carrier, if I am correct, in your direct examination you said that much of the time you spent as much as twelve hours at the store during that period. A. I certainly did.

Q. Did you have any help in raising your children?

A. The first year in that store I didn't even have help at the house in order to do the work. I would get up and put a big washing out and be in that store by 9:30 in the morning and many a night I didn't get out of there until [59] 11:00 o'clock. When we started making some money, then I had some part time colored help. Well, I think it was in '49 I went down there and he net \$19,000 and we got busy there in the fall and we had part time help in the house.

Q. And you left at 9:00 o'clock in the morning and put in twelve hours and went home?

A. Not every day. Every other night. I had to take by turns working, and we didn't get out until 11:00 o'clock at night many, many times.

(Testimony of Irene M. Carrier.)

Q. Who took care of your children during that time?

A. At that time we started working together, my husband and I as a shift. we alternated shifts with two other people, and my girl was old enough, don't forget, to stay with the younger boy. And then after a while I said to him, "I don't think this is right, both of us being away from the children." I said, "Let us break this up. You be home one night and I will be home the other night." In other words we broke the team up.

Q. Mrs. Carrier, I have here a copy of the examination that we engaged in, in Mr. Licht's office, and if you recall, at that time you answered that you had no one to care for them.

A. I didn't have at first. Now you are referring to what happened when I was deserted.

Here I had a 13 year old son and a 19 year old girl. [60] That was the time—that was the age of those children.

Mr. W. E. Catlin: I see.

The Witness: And there was no one to take care of them. There was no support.

Q. (By Mr. W. E. Catlin): This was during the period—I just wanted to straighten this out in my own mind—this was during the period of May-April, 1953 on, then?

A. You were referring back earlier and I was giving earlier facts. You wanted to know how old my children were when I went down to Carrier's Furniture.

(Testimony of Irene M. Carrier.)

Q. Yes.

A. I told you. Now, you are in 1953.

Q. And your girl was 19 years old and you no longer had anyone.

A. I had nothing. I worked in that store ten or twelve hours a day and I went home and washed and cleaned and tried to keep that home together for those children.

Q. Now, Mrs. Carrier, you stated that you became owner of the business by virtue of the divorce decree, is that correct?

A. That is right.

Q. Prior to this time did you have any interest in the business, ownership of it?

A. No. That business was in my husband's name.

Q. Did you receive a salary? [61]

A. No. I was promised one, but I never got it.

The Court: We might recess at this time. I have a civics class here to give a little lecture or something. You may step down. We will recess until 2:00 o'clock.

(Whereupon at 11:55 a.m. a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, May 14, 1957.) [62]

Tuesday, May 14, 1957, 2:00 P.M.

The Court: All right, the witness may resume the stand.

Mr. Licht: With the court's permission, may I call someone out of turn?

The Court: Yes, sir.

Mr. Licht: Mr. Hill, please.

FRANCIS J. HILL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: And what is your full name, for the record.

The Witness: My name is Francis J. Hill.

Direct Examination

Q. (By Mr. Licht): Where do you live, Mr. Hill? A. Phoenix, Arizona.

Q. What is your job there?

A. I am manager of the Wholesalers Credit Association of Arizona, which is an Arizona affiliate of the National Association of Credit Men. I am also manager of the Credit Bureau, in the third operation of the Phoenix Lenders Exchange.

Q. How long have you held that job?

A. About nine years.

Q. And how many years' experience have you had in the [63] field of credits and collections?

A. I started in 1929. I have been in and out of it since then. The larger part of the time has been in that work since that time.

Q. Will you tell the court when you first met or became acquainted with Irene Carrier?

A. In June of 1953.

Q. Will you tell the court the circumstances of that first meeting?

A. May I inject there a word of explanation. In the Wholesalers Credit Association we have three departments, what we call a credit interchange department, which is a credit reporting de-

(Testimony of Francis J. Hill.)

partment; we have a collection department and we have an adjustment department.

In the adjustment department, we for the benefit of debtors and creditors alike handle amortizations, compositions, certain types of escrows and similar matters.

I was asked to have my office available for a creditors' meeting of the Carrier Furniture Company, and three creditors' meetings were held in the month of June.

Q. 1953?

A. 1953. Would you like the dates? I can give you the exact dates if you would care to have them.

Q. That is all right. These meetings were held and at that time did you actively participate at all?

A. I did. I sat in at all three.

Q. And were you retained in your official capacity in connection with the Carrier Furniture?

A. The Wholesalers Credit Association was asked to handle this as an amortization matter.

Q. What exactly do you mean by an amortization matter?

A. Well, to contact all the creditors and ask them if they would authorize the Association to represent them and at the same time to accept their pro rata share of any funds which we might receive from the debtor for distribution to all the creditors.

Q. And in that connection what is the first thing that you did?

A. Two meetings were held, on June 3rd, 10th and the 17th, and after the meeting on June 17th

(Testimony of Francis J. Hill.)

we sent out an explanatory bulletin to all of the known creditors. Those creditors were—the list was based on a list I received from the bookkeeper at the Carrier Furniture Company.

Q. Do you remember approximately how many creditors were on that list?

A. I believe there were 60.

Q. And is this document here the first letter that you sent?

A. That is the first bulletin we sent out to the creditors, and as I say, with that we enclose an authorization [65] form for them to sign and return to us.

Q. And that is the letter, the bulletin dated June 26, 1953? A. Correct.

Q. Now, following that, when did you send subsequent bulletins to the creditors? What was the next thing you did?

A. On August 18th, and in order to keep the creditors informed, I sent a second bulletin out as an explanatory bulletin telling them what had transpired since the previous one on June 26th.

Q. And is this a copy of that bulletin (indicating document)?

A. That is a copy of that bulletin.

Q. Then, did you follow that with another bulletin?

A. Then, on September 18th we sent another bulletin, and with that we enclosed checks for 43 per cent of the amount due the various creditors, as the first distribution.

(Testimony of Francis J. Hill.)

Mr. Licht: Your Honor, I would like to offer these three letters of June, August and September as plaintiff's exhibit next in order, I think in one exhibit will be all right.

The Court: All right. They will be received.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit No. 4.) [66]

Q. (By Mr. Licht): Following this payment of 43 per cent which you said you sent out, what did you next do in connection with it?

A. We sent out—on November 27th we made an additional distribution of eight per cent and with that we enclosed this letter (indicating document).

Q. Then what happened next?

A. We continued to make periodic distributions, one on December 15th of six per cent, one on February 18th of six per cent, one on June 30th of three per cent, one on October 28th of three per cent. That made a total of 69 per cent.

Q. And these last ones you are talking about were in 1954, were they not?

A. That is correct.

Q. And now, this is in November 1953, in this letter, this statement that you made?

A. Yes, that is right.

Q. And the payments that you made were in 1954, is that correct?

A. That is right. I haven't got copies of all those payments, but I have most of them here if you would like to have them.

(Testimony of Francis J. Hill.)

Mr. Licht: I think it is not necessary to include them all in the record, unless you would like to have them [67] included. Do you want me to include all these, counsel?

Mr. W. E. Catlin: I beg your pardon?

Mr. Licht: Do you want me to include all these? I think it would just burden the record. Do you want me to include all these letters showing percentage of distribution?

The Court: I don't think you need to put them in, but you have them there and you will have them available.

Mr. Licht: I have them and they will be available, yes.

Q. Now, during this period, that is from the summer of '53 when you first had something to do with the Carrier Furniture Company until the last payment that you mentioned, were you in constant contact with the business?

A. I was in frequent contact with it.

Q. And did you have occasion to visit the premises?

A. Yes. I made a practice to go down periodically or whenever Mrs. Carrier requested me, to her place of business.

Q. Now, going back, if I may for a minute, to the period between June of 1953 and the time that you made the first 43 per cent distribution of which you spoke, did you have any active part in the control of the funds of that firm at that time?

A. Mrs. Carrier of her own accord asked me to

(Testimony of Francis J. Hill.)

co-sign checks there for a period of time. I can't tell you the exact date that that started, but she wanted to have some [68] control over the distribution of funds, even for the current expenses. One reason for that was—may I give you an explanation?

Mr. Licht: Yes.

Mr. Lindenbaum: Might I object, if the Court please, to him giving reasons.

The Witness: All right.

The Court: All right. I will sustain the objection.

Q. (By Mr. Licht): You did co-sign checks anyway, is that right?

A. I did for a period of time.

Q. Did you send out letters to the various creditors in the beginning, asking them to go along with this plan you had for payment?

A. I did. That was the first bulletin of June 26th I referred to before.

Q. And what sort of responses did you get?

A. We received a very satisfactory response. We received authorizations over a period of time from all but eight or nine of the 60 creditors?

Q. Do you have any way of identifying those eight or nine that you didn't receive responses from?

A. I believe I have a list of them. I have here a list of the creditors.

Q. That didn't go along with the plan? [69]

A. That did not return the signed authorization.

(Testimony of Francis J. Hill.)

Q. Would you read that list, please?

A. Craft Furniture Company, Blowing Rock Furniture, Colonial Craft, Dixie Furniture Company, the Englander Company, Lights of Hollywood, Sandhill Furniture Corporation, Virtue Brothers and Viking Artline Corporation.

Q. Except those people, did all the other known creditors go along with your plan?

A. They did.

Q. Now, I believe there was a contract of plan, was there not, which you had all the various creditors sign?

A. Yes.

Q. Do you have a copy of that?

A. I think this is it here. This is the agreement which they signed. That is one of the signed agreements, by the way.

Q. Now, I believe this agreement calls for, among other things, the payment of a thousand dollars a month after the initial payment, is that correct?

A. That is correct.

Mr. Licht: May I introduce this, your Honor, as plaintiff's exhibit next in order?

The Court: Yes, as the next in order.

Mr. Lindenbaum: That is the extension agreement?

Mr. Licht: This is the agreement with all the creditors for payments. [70]

The Clerk: Plaintiff's Exhibit No. 5.

The Court: No. 5.

(Said document was received in evidence and was marked as Plaintiff's Exhibit No. 5.)

(Testimony of Francis J. Hill.)

Q. (By Mr. Licht): Do you recall—did she make the payments under this agreement?

A. She made—first I refer to the 43 per cent payment. Then on November 27th an eight per cent payment. Then we made a payment of six per cent on December 15th. The reason for that was that a thousand dollars would have represented approximately three per cent a month and the work involved was so voluminous that we made it a practice to make payments every 60 days, rather than every 30, because our fee was eight per cent, that is the gross fee was eight per cent which included legal services, and we simply couldn't afford to make payments to 60 creditors every 30 days out of a thousand dollars.

Mr. Lindenbaum: Your Honor, the witness refers to December. Will you please state what year, in December?

The Witness: I refer to three per cent of the original indebtedness.

Q. (By Mr. Licht): December of what year?

Mr. Lindenbaum: December of what year?

The Witness: I was making the—— [71]

Q. (By Mr. Licht): Well, just what year were you referring to when you were referring to December?

A. I was referring to December of 1953.

Q. Thank you. Now, was there a period following that when Mrs. Carrier didn't make the payments required? A. Yes.

(Testimony of Francis J. Hill.)

Q. Do you recall the circumstances with respect to that?

A. We made a payment of six per cent on February 18th, which covered the payments due January 15th and February 15th, and then on March 15th, I sent out an explanatory letter to the creditors, a copy of which I have here, and to that letter was attached a letter which I had received from the firm of Bumsted & Linsenmeyer, the attorneys for Carrier Furniture Company, and with it as well I enclosed an agreement which if the creditors signed it would authorize a moratorium on the payments of a thousands dollars for the months, March 15th, April 15th and May 15th.

Q. This was 1954, is that right?

A. This was as of 1954.

Q. And did the creditors substantially agree to that moratorium period? A. They did.

Q. And what happened after that moratorium period?

A. Then, on June 30th of 1954, I made one payment of [72] three per cent of the original indebtedness.

Q. How much was that?

A. It was a thousand dollars.

Q. It was how much? A. \$1,000.

Q. What then next followed?

A. Then there was no further payment—I did not receive any until October, '54. That was another thousand dollars and we made the distribution on October 28th.

(Testimony of Francis J. Hill.)

Q. When was your next payment that you received?

A. That payment of October 28th represented a payment of 69 per cent.

Q. Of the original indebtedness?

A. Of the original indebtedness.

Then, on January 7th——

Q. Of which year, now, January 7th?

A. Of 1955, at the request of Mrs. Carrier I sent a letter out. May I read it or not?

Q. No.

A. All right. This was a letter stating that on October 28th I had made a distribution of three per cent and mentioning the fact that that three per cent represented a total payment of 69 per cent of the original balance to the creditors.

Then, Mrs. Carrier asked me to invite the creditors to [73] accept one single payment of an additional ten per cent of the original balance in full settlement of the account. In order to make that additional ten per cent payment, she said that she had arranged to borrow \$6,000 from her friends, \$3,000 of the \$6,000 to be turned over to our Association for distribution, and the other \$3,000 was to be used to purchase for cash additional furniture for the normal operation of the business.

Q. And you dispatched this, then, to all the then known creditors?

A. I did. Pardon me. I dispatched that to all the known creditors with the exception of the credi-

(Testimony of Francis J. Hill.)

tors who were represented by the eight or nine firms mentioned.

Q. Who represented them, if you know?

A. Locally, David E. Wilson, attorney.

Q. And did the creditors you sent that list to go along with that arrangement?

A. All with the exception as I recall of I believe three.

Q. Approximately how much was involved in those three?

A. This is only recollection: I believe it was about \$500.

Q. And then did you do anything else in connection with the Carrier account after that?

A. I sent a second letter out January 18th to those [74] creditors who had not already accepted that ten per cent payment and I followed that up with another letter on January 31st.

Mr. Lindenbaum: If your Honor please, I would like the year on these.

The Court: The year?

The Witness: I am sorry. January 18, 1955.

The Court: All right.

The Witness: Pardon me.

Then, on January 31, 1955 I sent another letter, with a balance sheet which had been given to me by Mrs. Carrier, and with it I enclosed a mimeographed copy of a letter of explanation which Mrs. Carrier gave to me.

Mr. Licht: Your Honor, at this time, before I get too lost on this, I would like to offer this letter

(Testimony of Francis J. Hill.)

of March 15, 1954, as plaintiff's exhibit next in order. That is the one I just showed you. I have been holding it.

Mr. Lindenbaum: Oh, you showed it to us?

Mr. Licht: I showed it to you.

The Court: All right.

The Clerk: That is Plaintiff's Exhibit No. 6 in evidence.

The Court: Yes.

(Said document was marked Plaintiff's Exhibit No. 6 and was received in evidence.) [75]

Mr. Licht: Here is a letter which I will show you. This is Plaintiff's Exhibit No. 7, which is the letter of January 7, 1955.

The Clerk: Will it be received?

The Court: It will be received.

The Clerk: Plaintiff's Exhibit No. 7 in evidence.

(Said document was marked Plaintiff's Exhibit No. 7 and was received in evidence.)

Q. (By Mr. Licht): And when that last \$3,000 was disbursed, was that your final connection with this matter?

A. It is not my final connection.

That final distribution of ten per cent was made on March 4th, if you care to have a copy of that letter.

Then, on April 5th, I sent out the final bulletin which I recall having mailed, and I sent that to certain creditors whom Mrs. Carrier asked me to mail it to and said that they would have some in-

(Testimony of Francis J. Hill.)

formation regarding her financial status, at that particular time, that is, April 5, 1955.

Q. Now, on this question of financial status, did you have a financial statement of Carrier Furniture during the period when you were doing this?

A. The first financial statement we had was one dated May of 1953, which was enclosed with the first bulletin I mailed to the creditors on January 26th.

Q. You sent that to all the creditors? [76]

A. That was sent to all the known creditors.

Q. Does that include the list that you read that were represented by Mr. Wilson?

A. Correct.

Q. And during this period from 1953 to 1955, did you ever refuse to give a financial statement to anybody who asked for it in connection with the Carrier Furniture? A. No.

Q. Did anybody from Lyon's firm contact you asking for a financial statement? A. No.

Q. Did anybody from Lyon's contact you at all?

A. I was not contacted, although on one day I met two representatives of Lyon's Furniture, but it was not in connection with any request on their part for a financial statement.

Mr. Lindenbaum: May we have the time, please?

Q. (By Mr. Licht): Yes. When was that?

A. My recollection is that it was Memorial Day, I do not know what year, Mrs. Carrier called me up and stated that two Lyon's Mercantile representatives were going to be in town and she asked

(Testimony of Francis J. Hill.)

me if I would not come to the store, and that is all there was, that was her statement. I went to the store. I made no observation, made no comment. I was simply present. [77]

Q. And did they ask you anything about the matters, do you remember?

A. Not to my knowledge.

Q. Now, since these items covered in the list which you gave, have you received any other matters, from any other of your customers throughout the United States for collection with Carrier Furniture or Wishmaker House? A. No.

Q. And at the time this matter was first turned over to you in 1953, did you have an opinion as to—well, I will strike that. In your dealings with the Carrier Furniture Company and Wishmaker House, were you representing the creditors, is that your job? A. That is correct.

Q. You were not representing Mrs. Carrier at any time, were you? A. No.

Q. Your job, then, was to represent the creditors in the collection of these accounts, is that correct? A. That is right.

Q. In your opinion, and from your experience in the business which you have heretofore stated, would it be your opinion that the creditors received more or less of a distribution from this matter than they might have received had the matter been turned over into bankruptcy? [78]

A. That is my opinion, based on the fact that

(Testimony of Francis J. Hill.)

I have acted as a receiver and a trustee in bankruptcy.

Q. What is your opinion?

A. My opinion is that they would probably receive two to three times as much through an amortization as they would if bankruptcy proceedings had been consummated.

Q. In your opinion, during the period of time in which you were active in this matter, that is, between 1953 and 1955, did you have an opinion as to the management of Wishmaker House?

Mr. Lindenbaum: Your Honor, I object to that question as being immaterial and incompetent.

The Court: I will overrule the objection. He may answer.

Mr. Lindenbaum: I respectfully except.

The Court: He may answer. I will overrule the objection.

The Witness: State that question again.

The Court: All right.

Q. (By Mr. Licht): Did you have an opinion as to the management of the business during these years?

A. I thought she was doing a very satisfactory job.

Q. Would that opinion be the same from the standpoint of being a credit and collection man as from——

Mr. Lindenbaum: I object to that, if the Court please, as incompetent. [79]

(Testimony of Francis J. Hill.)

Mr. Licht: He has testified that this is his business.

The Court: I will overrule the objection. He may answer.

The Witness: Will you please state the question again?

Q. (By Mr. Licht): Well, as a man with experience in the field of credits and collections, would you consider that the management of this firm during 1953 to 1955 was good or bad, or what?

A. Why, I think it was very good and I was aware of the difficulties she was experiencing in the operation of the business.

Q. What difficulties were you personally aware of?

A. She was unable to get certain lines of furniture which she had handled in the past, and of course that prevented her from making deliveries to certain customers who wanted brand merchandise, particular types which she wasn't in position to deliver.

Q. Mr. Hill, I am going to show you a letter dated October 14, 1954, which appears to be signed by you and ask you to read that letter, please.

A. "Dear Mrs. Carrier"—

Q. No. Just read it to yourself.

A. All right.

(A short intermission.)

Q. Now, have you read it? [80] A. Yes.

Q. Does that refresh your recollection at all as

(Testimony of Francis J. Hill.)

to some payments that you had sent to some creditors which had been refunded or returned?

A. May I refer to something here?

Q. Yes.

(A short intermission.)

The Witness: I believe that that letter refers to a check which I had sent to Attorney Wilson in payment, in partial payment of the amount due the creditors which he represented.

Q. (By Mr. Licht): And what happened with respect to that? What did he do or what happened?

A. Well, it was customary, as I said previously, to deduct eight per cent from each remittance to the creditors to cover our fee and to cover the legal costs involved, and Attorney Wilson declined to accept payment on that basis, he declined to permit us to make any deductions for our services.

Q. Did he send any money back for any other reason that you recall?

A. I don't recall at the moment. Pardon me. I do recall something else, if I may supplement that. It was not on October 4th. May I refer to my papers here a minute?

Mr. Licht: Yes.

(A short intermission.) [81]

The Witness: I think this 145—

Mr. Licht: Go ahead.

Mr. Lindenbaum: If your Honor please, I would like to object to statements of what Attorney Wilson did, in view of the fact that there has been no foundation laid, prior showing that Attorney Wil-

(Testimony of Francis J. Hill.)

son has anything to do with Lyon, or that we are to be bound by the statement.

Mr. Licht: I intend to tie it up with later testimony, your Honor.

The Court: He is called out of order. I will overrule the objection. He may answer.

Mr. Licht: Go on. Your answer?

The Witness: I believe that my statement is correct regarding that 145.54. I haven't given this any thought, now, for almost three years, so it is just my recollection. In August 1954, however, I had made three payments to Attorney Wilson, one for \$17.50 payable to the Englander Company, one for \$42.34 payable to Sandhill, and one for \$36.68 payable to the Dixie Furniture Company, and the reason he returned those checks to me was because he had executions out for the full amounts of the claims and he said he could not accept a partial payment. That was in August of 1954.

Q. (By Mr. Licht): I just want to show you one more document, if I may, sir. This is Plaintiff's Exhibit No. 2 for identification, and I ask you if that document is familiar to you? [82]

A. Yes, it is.

Q. And did your office prepare that?

A. We did.

Q. What is that?

A. That is a complete list. I think that is dated in August, is it not? That is dated August 27, 1953. It is a complete itemized list of the checks that we were planning to forward to the creditors of Car-

(Testimony of Francis J. Hill.)

A. The Wholesaler's Credit Association of Arizona.

Q. The Wholesaler's Credit Association of Arizona, this concern, does it do credit reporting?

A. It does.

Q. And had you ever issued a credit report on Carrier Furniture prior to July of 1953?

A. I assume we did, although I don't know. I have a staff of over a hundred employees. We do a large volume on the overall operation and I am not familiar with detail in one department of the Association's outstate. We turn out in [85] excess of 900 credit reports a day and with that volume it is impossible for me to know unless I make it a point, of what that daily volume consists.

Q. Well, in this particular case, then, Mr. Hill, when we are talking about your relationship with the Carrier Furniture Company which it was called at that time, this would then fall within your adjustment department?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And when you have a business that comes to you for assistance within your adjustment department, as a general rule are they healthy businesses?

A. As a rule, they are in a condition where they need cooperation on the part of their creditors.

Q. And when you arrange to assist in the affairs of a business in such a condition, do you take over the entire financial management of the business?

(Testimony of Francis J. Hill.)

A. It depends entirely on the particular case. It varies according to the case at issue.

Q. Now, in the particular case that we are speaking of, of the Carrier Furniture Company, did you take over the financial management of the affairs of the business at that time?

A. We did not. [86]

Q. And what exactly did you endeavor to accomplish for the Carrier Furniture Company?

A. Bear in mind that I was working with the cooperation of the creditors' committee. I looked to them for advice and help whenever it was needed. And I was representing—I felt that the Wholesalers was representing those creditors, and it was our job to have the business operated efficiently. I felt that Mrs. Carrier was doing a good job. The creditors' committee felt as I did and were satisfied that she was cooperating to the fullest extent. We were not concerned at all with—we had no thought that she would not do what she had agreed to do, and that was to cooperate completely.

Q. Well now, you state that they all agreed that Mrs. Carrier was doing a good job. This may be true, but what was this good job she was doing, as far as you were concerned? Wasn't it the paying up of the \$49,000 or roughly \$49,000 in indebtedness which was past due at this time?

A. That is right. That was our major objective.

Q. And during this period that you were aiding and assisting in this, you were aiding and assisting in the past due obligations only, is that correct?

(Testimony of Francis J. Hill.)

ited amount of merchandise, to continue the operation of the business.

Q. This is a custom of the trade?

A. This is customary in many instances.

Q. So then, this is again a matter for the individual manufacturer to determine?

A. It is entirely up to the manufacturer to decide what should be done.

Q. Now, I am looking at a copy of a letter of September 18, 1953, written by you. I beg your pardon. This is not the one I want.

This is a letter written June 26, 1953, and I note that in this paragraph you state that you were retaining cash for C.O.D. purchases, is that correct?

A. Correct.

Q. Then, in June 1953, the Carrier Furniture Company was making purchases on a C.O.D. basis?

A. Correct. Fill-in merchandise.

Q. And this was approximately the time you came into the picture? A. Right.

(A short intermission.) [90]

The Witness: That is customary for any store in that condition to do that.

Q. Now Mr. Hill, you stated that an extension agreement was entered into with a great number of the creditors. Was this on your advice?

A. Why, I don't give advice. I simply pass on the information and let them make their decision. I do not urge people to do it.

Q. Well then, let me put it this way: You say you were governed to a large extent by the desires

(Testimony of Francis J. Hill.)

of the creditors' committee? A. Right.

Q. Which was made up of creditors who all had past due obligations owed by the Carrier Furniture Company? A. That is right, correct.

Q. Did the creditors' committee feel that this was a necessary thing?

A. The creditors' committee felt that if this was not done, it would simply mean that the business would have to be discontinued and that would result in bankruptcy; and a going business is always a more satisfactory way of completing the payment of past due balances, rather than simply closing it up and selling whatever furniture is left at auction and get a very, very small percentage of its retail value.

Q. What steps did you take to physically protect the [91] creditors' interests during this period?

A. Well, bear in mind that the local creditors who were acquainted with the Carrier Furniture operation had confidence in Mrs. Carrier, and it was not felt necessary to employ the equivalent of a custodian out there to watch everything that went on. At that particular time, as I recall it now, we were simply co-signing checks with Mrs. Carrier and felt that was sufficient.

Q. And isn't it true that this is normal procedure?

A. That is normal procedure.

Q. The co-signing of the checks?

A. That is right.

Q. Whether or not Mrs. Carrier had requested

(Testimony of Francis J. Hill.)

it, it was the normal procedure for this type of——

A. It is a normal protection.

Q. At the time you assumed the duty of assisting the Carrier Furniture Company, did your concern have any claim for collection against Carrier Furniture Company from other creditors?

A. No.

Q. Have you at any time had any claims for collection? A. Not to my knowledge.

Understand, again, that we handle a very sizable volume of business. Ours is a departmental operation. With the staff I have, I can't keep a detailed account of what goes on [92] in any one department.

The supervisor of the department or manager is responsible for the operation of the department.

I am not familiar with all the details.

Q. Now, would you state to me the total amount in percentage that was eventually—and by this I mean from the 1953 to the 1956 period—recovered by creditors, the percentage that was recovered by creditors of the original indebtedness.

A. 79 per cent.

Q. 79 per cent. Were there any exceptions to this?

A. As I recall it, there were three representing about \$500.

Q. And on these exceptions, did they receive more or less than 79 per cent?

A. Those folks eventually received the full amount, because they refused to go along.

(Testimony of Francis J. Hill.)

Q. Did they obtain judgments and levy executions?

A. That I couldn't answer. There were certain—I was more or less inactive after—I am not familiar with everything that went on after the date of that ten per cent payment which I think was March of 1955. I believe that is the date.

Q. Let me ask you one more question, please, Mr. Hill. Is your Association in effect a competitor of the Lyon Agency? [93] I mean do you handle the same type of thing they do?

A. It may be that I am not familiar, too familiar, with the operation of Lyon's. I think it is a special—I believe it is a specialized credit service, whereas, we furnish information on all types of debtors.

Q. Supposing that you have a competitor in this business of yours, limiting it strictly to the Arizona business, would you ask this competitor for a credit report on some other business?

A. We don't—we do not make it a practice of doing it, but to be specific, if, for instance, Dun & Bradstreet wants information which we have, we are glad to give it to them.

Q. Yes, but that wasn't my question. My question is specifically as a general custom of the trade, competing organizations, do they or do they not ask their competition for credit reports?

A. Not in wholesale credit, as a regular practice.

(Testimony of Francis J. Hill.)

Mr. W. E. Catlin: Thank you. One moment. Your Honor, I have a few more questions.

The Court: Certainly.

Q. (By Mr. W. E. Catlin): To the best of your knowledge, Mr. Hill, have you ever been called on by the Lyon Agency for a credit report on any creditor—I don't mean creditor, Mr. Hill, I mean any business organization? [94]

A. Not to my knowledge, in the Wholesalers. I received a letter, not too long ago, as manager of the credit bureau asking if we are in a position to furnish them with credit information, but that was in my capacity as manager of the credit bureau and not the Wholesalers.

Q. I am limiting this to you——

A. Yes, I just wanted to have you understand that.

Q. Now, one more thing. You stated that you met one member of the Lyon Agency. I think this was on Decoration Day?

A. That is my recollection.

Q. Could you be a little more definite in pointing out what year it was?

A. I don't remember. I simply remember that—I don't know whether it was '54 or '55, when it was, I couldn't answer that question.

Q. Isn't it true that it was just a year ago, 1956?

A. I don't know when it was.

Q. You just don't remember?

A. I am sorry. I wouldn't know the gentleman if I saw him.

Mr. W. E. Catlin: Thank you. That is all.

Mr. Licht: I have nothing further. May the witness be excused?

The Court: Yes, the witness may be excused.

We might stop and take the afternoon recess. We have accommodated the witness. We will take the afternoon recess.

(Recess.)

The Court: We will just come to order. Call the plaintiff back on the stand.

IRENE M. CARRIER

the plaintiff herein, resumed the witness stand on her own behalf and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Mrs. Carrier, let us go back to 1953, where we left off. Now, sometime in the summer of 1953, after you took over the business in its entirety, you entered into an extension agreement with your creditors, is that correct?

A. That is true.

Q. Do you recall when this occurred?

A. Well, actually, verbally it occurred in the early part of June. In writing it occurred, went out in writing in the credit agreement at the end of my divorce, which was around the end of September.

Q. And do you recall the terms of this agreement specifically, when it was to take effect, when you were to make the first payment under it?

A. Yes, I do.

(Testimony of Irene M. Carrier.)

Q. On what date was that? [96]

A. The original meeting, and Mr. Hill has his papers here, there were three meetings I believe that were called and I believe if you will read those letters you will see that there is a promise of payment to creditors around early in July.

Q. Excuse me, Mrs. Carrier. I am speaking of the formal agreement that you cited, the written one.

A. The written agreement was around the end of September, as I recall.

Q. When were you to make the first payment after the date of the agreement?

A. Well, I was to make a payment each month.

Q. Was this October, starting in October, November?

A. We made the big disbursement there I believe the end of September, October——

Q. And according to the terms in the agreement, then, you were to make a payment monthly, is that correct?

A. That is right.

Q. And did you make the payments as called for under this agreement?

A. As long as I could, I did.

Q. As long as you could. I assume from this that you were not able to continue to make the payments.

A. That is when we asked for the moratorium.

Q. When did you ask for that moratorium? [97]

A. That was asked for I think in March of 1954.

(Testimony of Irene M. Carrier.)

Q. Did you make the payment for March of 1954?

A. I don't believe we did. I think we made January—December, January and February, if I recall.

Q. What was the dollar value of each payment, how much was the payment to be?

A. I don't understand.

Q. How much were you to make, what size payment each month?

A. A thousand dollars each month.

Q. You made these payments, then, until March, but not including March, 1954?

A. That is correct.

Q. When were these payments supposed to have been made, at what time of the month, was there a specified date?

A. I am not sure. I think they were to be in sometime between the 10th and the 14th of the month, but I am not sure.

Q. I see. And sometime between the 1st of March and roughly the 14th, you realized that you could not make the payment for March?

A. That is right.

Q. And you then asked for the moratorium?

A. That is correct.

Q. And for how long did you propose a moratorium? [98]

A. For three months.

Q. For three months. This would be for March, April and May?

A. That is right.

Q. Resuming then, in June, is that correct?

(Testimony of Irene M. Carrier.)

A. We made a payment in June, I believe.

Q. Did you resume in June?

A. I am fairly certain we made a thousand dollar payment in June. We could not make it in July. We made \$500.

Q. In July you were unable to meet the terms of the agreement? A. We made \$500.

Q. Did you make any \$500 payments or \$1,000 payments under the express terms of this agreement thereafter, June of 1954?

A. Would you say that again?

Q. Did you make any further specific payments under the terms of the agreement, after June of 1954?

A. Yes, but I don't remember just how much. We have voucher checks there showing payments into the fall. Just how much I don't recall.

Q. You made payments into the fall of 1954. Do you recall whether there were all \$500 payments?

A. Mr. Catlin, we made payments up to the time of settlement. As to whether they were—I think sometimes [99] they were a thousand and I think sometimes they were \$500—the best I could do.

Q. This I realize, Mrs. Carrier. What I want you to express to me is did you continue to live up to the terms of the agreement after the moratorium, until you paid the debts off in their entirety?

A. May I put it this way: To the best of my ability, I always tried to live up to that agreement.

(Testimony of Irene M. Carrier.)

Q. Then, may I ask you this question: Did you have the ability to pay all your debts off under the terms of the extension agreement?

A. Did I have the ability?

Q. Yes.

A. Apparently I thought so or I wouldn't have assumed it.

Q. But did you have the ability?

A. I think I did. I think I did beautifully well.

Q. Did you pay the indebtedness off in accordance with the terms called off by the extension agreement?

A. To the very best of my ability.

Q. I am sorry, but this doesn't answer my question. I need either a yes or a no.

A. A thousand dollars was paid each month when I could do it. There were times I think when we dropped down to 500. [100]

Q. Were there months when you paid nothing?

A. I don't believe so, after the moratorium, but I can't say for sure.

Q. You can't say for sure. However, you are certain that you were not able to pay \$1,000 each and every month as the agreement called for?

A. That is right.

Q. Did you ever pay the creditors to this agreement 100 cents on the dollar?

A. Now, would you say that again, please?

Q. Did you ever pay the creditors who were parties to this agreement, the extension agreement

(Testimony of Irene M. Carrier.)

that we are just speaking of, their obligations 100 cents on the dollar?

A. We paid three people who Mr. Hill told you about. I don't remember their names.

Q. How much did you pay the remaining people? A. 79 cents on their dollar.

Q. 79 cents?

A. Two of your accounts had a hundred cents.

Q. Do you recall when this payment was completed, the 79 cents on the dollar?

A. I think either February or March of 1955. That would be less than two years after I took over.

Q. Mrs. Carrier, I have here a letter, a mimeographed letter dated January 29, 1955. This is addressed to the [101] creditors of Carrier's Furniture. May I ask you whether or not you wrote that letter? A. I wrote this letter.

Q. Did you send it to all of your creditors?

A. I gave it to Mr. Hill's organization and he sent it, I believe.

Q. I see. Now in this letter, Mrs. Carrier—excuse me, your Honor—

(A short interruption.)

Isn't it true, Mrs. Carrier, that in January of 1955, you advised your creditors that you were operating your business on a shoestring?

A. That is right. They knew that all along.

Q. And at this same time didn't you advise them that you were on a C.O.D. basis?

A. I think the letter says C.O.D. and C.B.D.

Mr. Catlin, from the time that I moved that

(Testimony of Irene M. Carrier.)

store and started restocking and getting new merchandise, with the exception of a couple of "sharp boys," who dared to ship me a C.O.D. on fabrics, and there is one firm over here in Los Angeles that I occasionally have to buy that way from because they have some fabrics tied up that I can't get anywhere else, my store was never on a C.O.D. basis and it was not for this reason, because I felt that I couldn't possibly go out on that market and buy on C.O.D. and protect [102] my manufacturer. How would I know that I would have five or six hundred dollars in the bank when that merchandise came in? And I never placed a purchase order and I never confirmed an order without letting them know in advance. And I would say to them, "I have \$500" or "I have \$600. You may ship, and will you please confirm as to when you are shipping."

My money went on in advance, and my money was held, incidentally.

Q. Isn't it a fact that you did tell your creditors you were on a C.O.D. basis?

A. There is very little—I think you will read in that letter it is C.O.D. and C.B.D.

Q. I hand this to you and here is the paragraph (indicating), so that you may refresh your memory, Mrs. Carrier.

A. Well, it says C.O.D., but that was actually the way it was worked and if you will check with the manufacturers, you will find that it is true.

Q. Then, it is true that you did tell your credi-

(Testimony of Irene M. Carrier.)

tors generally, and all of them, that you were on a C.O.D. basis?

A. Well, you might look at it this way, too: Whenever you are in a mess like this and you try to open an account, they immediately say C.O.D. to you and I right along refused C.O.D., and I told you why I refused a C.O.D. They are still doing it to me. However, I think if you will check with the manufacturers you will find that what I am saying is true; [103] there was very little C.O.D.

Q. Now, at this time, approximately in January, 1949, you had somewhere in the neighborhood of \$9,700 remaining that had not been paid of these original past due accounts that you assumed, is that correct?

A. You just said 1949. Would you please state it.

Q. No. 1955, January, 1955, January 29, 1955, is that correct?

A. When that letter went out, we had paid that indebtedness down to \$9,700.

Q. And at this time, didn't you tell your creditors that unless they accepted your settlement offer of \$3,000 on the \$9,700, you were simply going to walk out and leave them holding the bag?

A. That is right. That is the only choice I had. Mr. Catlin, when that letter went out, I had out on my little store almost \$4,000 of my working capital, some of which had been out for over 60 days, and I had almost two years of that and I kept

(Testimony of Irene M. Carrier.)

my doors open. That is why the letter went out, because I had all I could take and I knew they were breaking me.

Q. Was this letter sent with the approval and with the counsel of Mr. Hill?

A. The letter was I believe sent out from his organization. [104]

Q. Mrs. Carrier, when your husband ran the business, did he employ a manager?

A. He hired a manager.

Q. Could you tell me when this was?

A. About the fall of '49 until, oh, we had him two years. I wouldn't call him manager, however. He really didn't manage.

Q. Well now, after you assumed responsibility for the entire management of the Carrier Company, you state that you moved the store. This is correct, you moved to a new address, right.

A. My lease was expiring on East Van Buren, so I moved in January of 1954.

Q. And you obtained new premises and moved?

A. My lease was expiring.

Q. And at this time you changed the trade style of the business to Wishmaker?

A. To Wishmaker House, that is right.

Q. And you operated and managed the Wishmaker House completely yourself?

A. Yes, sir.

Q. Didn't you also have another store?

A. We had an overflow of inventory from the old store, which at the time we moved was, oh, a

(Testimony of Irene M. Carrier.)

good probably thirteen or fourteen thousand dollars, that couldn't go into this [105] little store. It wasn't the right type of merchandise. We wouldn't have had room for it anyway. So we rented a very cheap location at a hundred a month and tried liquidating it down there and putting our trade-ins and stuff like that down there.

Q. And in effect you opened another store?

A. It was really a warehouse sort of thing and liquidation of this old inventory from Carrier's Furniture.

Q. Did you call it Budget House?

A. We just called it Carrier's Furniture. Carrier Furniture is well known, so why kill a name?

Q. You spent your time operating Wishmaker's, because it was the prime line, correct?

A. I spent most of my time there, but I couldn't get decent management down at the other place or a decent sales person, and I never could be down there to sell, but I had to be back and forth, to see what was going on, taking inventory and that type of thing.

Q. You had somebody running the Budget outlet for you? Did you get that, Mr. Reporter? She nodded. I assume that means yes, Mrs. Carrier.

A. Oh, I am sorry. What did you say before that?

Q. You had somebody running the Budget store for you?

A. We tried it for a while. It didn't work,

(Testimony of Irene M. Carrier.)

couldn't hire anybody decent, so I just closed it up, waited for the [106] summer months to be over with, and simply liquidated and took as much for my dollar as I could.

Q. Prior to your liquidating it, you did have somebody running it for you?

A. For a few months.

Q. Now Mrs. Carrier, going back to 1953, shortly after you took over the business, didn't you have trouble at that time in obtaining merchandise from a great many of the wholesalers?

A. Mr. Catlin, the minute I took over April 10th of 1953, within a week the word was out over here, all over Phoenix, they were squeezing me in like nobody's business. I had to fight to keep those doors open.

Q. You had a lot of creditors that were on you, didn't you?

A. The big squeeze came out of Los Angeles, right here is where it came from. My Phoenix credit people—there was a lot of money owed in Phoenix—when they saw what I was trying to do, they knew me, they didn't squeeze.

Q. Didn't you have a great many people that you dealt with other than in the Los Angeles and Phoenix areas?

A. Oh, yes. We bought in the east.

Q. In Chicago?

A. We bought in the east. We bought in the east, but very few of those people ever squeezed.

(Testimony of Irene M. Carrier.)

The only ones that [107] did any squeezing are the ones that you people have.

Q. Didn't some of your eastern people—by using the word eastern I am using the western interpretation—east of the Mississippi River, file suit and obtain judgment against you?

A. Out of the 60 or 61 accounts that Mr. Hill had, you have the number there that through you people filed judgment suit against me, out of which there are 1, 2, 3, 4, 5, 6, 7, 8, 9.

Q. No. I am talking, Mrs. Carrier, of before you obtained Mr. Hill's assistance in this matter?

A. Oh, no. Most of those suits, these eastern suits, like Dixie and Sandhill, if I recall, were filed somewhere in July or August. Mr. Hill's credit meeting had been held.

Q. Yes, that is my point, before there was an extension of any kind?

A. Well, Mr. Hill actually had taken over from the early part of June and you have letters here that he sent out to the trade. The credit agreement didn't go out to the trade until later, because we couldn't send it out.

Q. But the credit agreement was entered into sometime in September, the extension?

A. That is right, but letters to all these accounts went out from Mr. Hill's organization.

Q. And isn't it true that you were sued and judgment [108] taken prior to this time?

A. That is true, but Mr. Hill was still taking over.

(Testimony of Irene M. Carrier.)

Q. And it is correct, Mrs. Carrier, and you correct me if I am in error, that we have definitely established that prior to the first of 1954, you were on either a C.O.D. or a C.B.D. basis?

A. Say that again, please, Mr. Catlin.

Q. Prior to January 1, 1954.

A. From 1953, April, 1953.

Q. Through this period?

A. Through that period, yes. I automatically put myself on a C.O.D. basis in Phoenix.

Q. But you were on either a C.O.D. or a C.B.D. basis?

A. That is right. You may continue that for a long time.

Q. Mrs. Carrier, in your complaint, you allege that you had a good credit rating. Will you please tell me who gave you a good credit rating in 1953?

A. What do you mean in my complaint? I don't understand you.

Q. In the plaintiff's complaint which you filed to initiate the action we are trying today.

A. In 1953, before the thing was in a mess, is that what you are referring to?

Q. You stated that prior to publication of Lyon's [109] report of March, 1954 you had a good credit rating.

A. We did have an excellent credit rating.

Q. All I want to know is who in 1953, after you took control of the business, gave you a good credit rating?

(Testimony of Irene M. Carrier.)

A. I don't believe that was ever said or ever implied.

Q. Did you have a good credit rating at that time?

A. Before April 10, 1953, I could go into the Chicago market.

Q. No. I am speaking of the time when you took over the business until the issuance of the first Lyon report, in March of 1953.

A. Who says? I didn't say that, and I think that if my attorney put that they are implying wrong.

Q. Then, in 1953, during this period, you did not have a good credit rating?

A. How could I have a good credit rating when I am in a mess, owing \$49,000? And I think my attorney meant that Carrier's Furniture, prior to this mess, had a good credit rating, which it did have.

Q. You mean the Carrier Furniture Company in 1946 and 1947?

A. 1946, 1947, until I went down there, Carrier's Furniture was a dead duck. When it started making money, we discounted most of our bills.

Q. At this time the business belonged to your husband? [110]

A. It always belonged to my husband, Mr. Catlin.

(A short intermission.)

The Court: Go right ahead.

Q. (By Mr. W. E. Catlin): Then, Mrs. Car-

(Testimony of Irene M. Carrier.)

rier, isn't it true that you have never had a rating of good payment in a credit report since you took over the Carrier Furniture Company?

A. I wouldn't say that is true. Dun & Bradstreet called me up. I have done always the best I could. Dun & Bradstreet have been very cooperative and they called me up, I would say a year and a half ago, and said, "Irene, I see where you are discounting your bills, you are coming out of it." And they later came on out to the store. I can't discount bills very often.

Q. This may be true, Mrs. Carrier, but it does not respond to the question. That is not a credit report. We are speaking of a rating of a good payment on a credit report.

A. I don't know. Don't you consider Dun & Bradstreet a credit organization?

Q. Yes, but I don't consider what they tell you on the telephone to be a credit report, and I am limiting my question to a credit report.

A. They were fine enough to come out and show me their written reports as to what they were publishing about me.

Q. Did you have a rating of good payment?

A. I haven't the remotest idea of how Dun & Bradstreet rate.

Q. Now Mrs. Carrier, this is the transcript of the pre-trial examination (Mr. Catlin indicates transcript).

The Witness: Isn't that what I just got through saying?

(Testimony of Irene M. Carrier.)

Q. (By Mr. W. E. Catlin): Is that what you mean? A. Yes. Might I say something?

Q. Yes, ma'am.

A. Or is it permissible?

The Court: That is all right. Go ahead.

The Witness: How could I have, Mr. Catlin, any kind of a credit rating? I was in a mess. I was paying off \$49,000. Who could expect me to be discounting bills?

Mr. W. E. Catlin: I understand, Mrs. Carrier, and while I know this, I have to ask you the questions and get answers to them.

(A short intermission.)

Mr. W. E. Catlin: I believe there will be no further questions.

The Court: That is all, unless you have something further.

Mr. Licht: No. We haven't anything further at this time, your Honor.

The Court: You may step down.

Mr. Licht: I will call Mr. Halfyard, please. [112]

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: May we have your full name for the record, please.

The Witness: Byron M. Halfyard.

Direct Examination

Q. (By Mr. Licht): Would you state where and by whom you are employed, Mr. Halfyard?

(Testimony of Byron M. Halfyard.)

A. Lyon Furniture Mercantile Agency in Los Angeles.

Q. And how long have you been so employed?

A. Since October, 1948.

Q. And in what capacity are you employed?

A. As a credit reporter.

Mr. Lindenbaum: Will you talk out so we can hear you, please.

The Court: A credit reporter, isn't that right?

The Witness: Yes.

Q. (By Mr. Licht): In connection with your job as a credit reporter, did you have occasion to make a series of reports on Irene Carrier?

A. I did.

Q. And would you tell the court when you made the first of those reports? [113]

A. The first report as shown here was on January 22, 1953.

Q. And that was on Irene Carrier doing business as——

A. This was Frank N. Carrier, Jr., the predecessor of Irene Carrier.

Q. As a matter of fact, you had some prior, earlier reports on Mr. Carrier, did you not?

A. That is the earliest one I have a recollection of, the earliest one I have here is January 22, 1953.

Q. Do you know whether there had been some earlier reports, during 1952, 1951?

A. I know there were some previous reports,

(Testimony of Byron M. Halfyard.)

but I don't know the date. I know them by the report in front of me.

Q. Tell me when they were?

A. It indicates there was a previous report, at least.

Q. Now, when was the first report that you have on Irene M. Carrier?

A. That was on December 29, 1953.

Q. Excuse me. I think you have a March——

A. Let us look back here.

Mr. Lindenbaum: If your Honor please,—Mr. Halfyard, will you speak up, please. We can't hear you over here.

The Court: All right.

The Witness: Yes, sir.

Q. (By Mr. Licht): Is December, 1954, the first report [114] you have on Mrs. Carrier?

A. December, 1953.

Q. December of '53, and is this the report (indicating)?

A. That is correct, sir.

Q. And did you prepare that report?

A. I did.

Mr. Licht: May I offer this report, your Honor, at this time?

The Court: Yes.

Mr. Lindenbaum: If your Honor please, the complaint relates to two reports on which they base their cause of action. The first report is March 23, 1954. The second report is April 18, 1955. I respectfully object at this time to going into any

(Testimony of Byron M. Halfyard.)

other reports, other than those that were mentioned in the complaint.

Mr. Licht: Your Honor, we were not aware of any other reports until substantially subsequent to the filing of the complaint, and in view of the additional reports which are shown by his file, we intend to ask permission to amend the complaint to include allegations as to these reports which I believe, if the court will examine, will show they are substantially the same and along with showing a series of acts of a similar nature.

The Court: Counsel states he didn't know anything about these and he wants to amend the complaint more or less to [115] conform to the proof.

Mr. Licht: That is correct.

The Court: With that statement I will overrule the objection.

Mr. Licht: Will you mark this?

The Court: You can do that orally tomorrow morning or you can do it in writing by filing an amendment.

The Clerk: Plaintiff's Exhibit No. 8 is in.

(Said document was marked Plaintiff's Exhibit No. 8 and was received in evidence.)

Mr. Licht: Do you have another copy of this?

The Witness: I don't, sir.

Q. (By Mr. Licht): Now, referring to this report, Plaintiff's Exhibit No. 8, I am going to read the second paragraph where it says, "It is learned that Irene M. Carrier has had no previous experience in the retail furniture business and that a

(Testimony of Byron M. Halfyard.)

Manager is employed to operate the business.”
Could you tell me at this time where or how you got that bit of information?

A. This information must have been available to me at the time I wrote the report.

Q. Well, from what sources of information available to you when you write the reports?

A. From a local credit agency, from the banks, from suppliers. Those are the principal sources.

Q. Is there anything in your file, now, which would indicate where you got that information?

A. I believe there isn't.

Q. Do you have any independent recollection of where you got that information?

A. I believe “It is learned that Irene M. Carrier has had no previous experience” referred to prior to the time the business was commenced by her husband.

Q. Do you know when the business was commenced by her husband?

A. I couldn't state the date exactly, but I could look at the previous report and tell you.

Q. Please do, if you can.

A. August 1, 1946.

Q. So that your testimony, then, that the statement there that Irene Carrier had no previous experience refers to the time before 1946?

A. I would think so, sir.

Q. Well, isn't it true that this is the first report on Irene Carrier, in 1953?

A. This report on Irene Carrier was a continu-

(Testimony of Byron M. Halfyard.)

ation report of Frank N. Carrier. It was never written up as an original report, but a revision of Frank N. Carrier, Jr.'s report, and the given names had merely been changed. It was the same business as far as it had been in the same family. [117]

Q. Prior to that time it apparently had been owned by Mr. Carrier? A. Yes, sir.

Q. Is that what your report disclosed?

A. Yes, sir.

Q. And sometime in between the time of your prior report and this report, Mrs. Carrier had become the owner, is that apparently the situation?

A. I am not sure that I understand it. I understand that Mrs. Carrier took over the business from Mr. Carrier, the same business.

Q. And that would be sometime in between those same two reports, isn't that true?

A. That is correct, sir.

Q. So it is your testimony, then, that in this 1953 report, December, 1953 report, that this statement with reference to her previous experience refers to prior to 1946, is that correct?

A. I would take it to mean that.

Q. And would you also take it to mean that there was some information in your file that disclosed that prior to 1946 she had no experience in the field? A. I believe so, yes, sir.

Q. But there is nothing in the file, now, of that nature? [118]

A. As far as I have been able to see, there isn't.

(Testimony of Byron M. Halfyard.)

Q. You have gone over the file pretty carefully, I assume, have you not?

A. I would say yes, sir. I might make a remark about the files. They are in constant use and any piece of information could be mislaid or misfiled.

Q. I want to ask you a couple of questions about that file. In your office, do you keep a file on a firm like Irene Carrier, you have one file for her, or do you have a series of files?

A. The current file is in one folder on Irene Carrier. Previous information we have that has been used to compile a report is filed in another folder, a folder that would contain all other reports compiled that date.

Q. How do you mean? I don't understand what you mean.

A. Well, if this report were compiled today on Mrs. Carrier and we use certain information that we had compiled, the report, other reports compiled in the same way in the office, the information used to compile those reports would be put in the file dated today. So that if we needed information on Mrs. Carrier, we would merely take out the folder dated today and look through it and pick out her name.

Q. Well, except for the file you have in front of you at this time, are there other files in the Lyon Company files, wherever that is, on Mrs. Carrier? [119] A. I presume not.

Q. Well, is that, then, all the information avail-

(Testimony of Byron M. Halfyard.)

able to you at this time with respect to Irene Carrier? A. I would say yes, sir.

Q. And is that also all the information with respect to the department of your firm known as the collection department?

A. No, sir. The collection department has their own file, a different system.

Q. Well, is that part of the file that you have in front of you?

A. The information here would come from the collection department. It should contain all the information the collection department has now.

Q. You know, don't you, that there were a series or a number of claims that were turned over to Lyon's for collection in 1953, against Mrs. Carrier's account? A. Yes.

Q. And is that disclosed in your file?

A. I would have to examine the reports to see mention of them.

Q. I am not talking about the reports. I am asking you about just the file itself, the fact that matters were turned over to Lyon's for collection.

A. I presume there were. I don't know. I am not sure [120] about that. Yes, there would be, from this letter here, that indicates that that is correct.

Q. This letter which I just pulled out of the file? A. Yes.

Q. It is a letter from David E. Wilson, attorney in Phoenix, to your organization, dated November 7th, with a stamp of November 9, 1953.

(Testimony of Byron M. Halfyard.)

Is that a letter that you received, that your firm received? A. Yes, sir.

Q. And this letter pertained to collection of certain accounts that you had turned over to him, is that correct?

Mr. Lindenbaum: When you say "you," are you referring to the witness individually?

Mr. Licht: I am referring to the firm of Lyon's.

Mr. Lindenbaum: To the firm of Lyon's?

Mr. Licht: I am not referring to him individually at all.

The Witness: This letter indicated collection items, I would say yes.

Q. (By Mr. Licht): All right, now going on from this point of collection for a minute, in your job of reporting to the member companies, would you just tell me exactly what the purpose of a credit report is that you make?

A. The purpose is to give our subscribers as complete a picture as we can as to the advisability of granting credit. [121]

Q. And in giving a report like that to your subscribers, is it your attempt to disclose to them all the information then available to you about this person's credit?

A. All of the information we think would be pertinent to a credit man's decision.

Q. And to use rather commonplace terms, would that include both good information and bad information? A. I would say yes.

Q. Would you consider it a part of your job in

(Testimony of Byron M. Halfyard.)

reporting on retailers to discard the good and just report the bad? A. Absolutely not.

Q. Or to report it all? So that if you were doing what you would consider a proper job of reporting, you would report all the information available, is that right? A. That is correct.

Q. And from what sources, now, would you get that information?

A. As I mentioned before, we get it from the suppliers, the banks——

Q. All right, let us take the suppliers first. How do you get information from the suppliers, write to them and ask them for it?

A. We have a form that we send to the suppliers, such as this form here. [122]

Q. And that form I presume asks them what history they have had?

A. How long the account has been sold, how much is owing, how much their high credit is, their manner of payment and the remarks regarding the account.

Q. And that is one of the items that you then put in a report, is that correct? A. Yes, sir.

Q. And you also check with the bank, if you know it, isn't that right?

A. That is correct, sir.

Q. And if the bank replies to you something with respect to the size of the account you forward that information, don't you?

A. Often they may furnish more information than that.

(Testimony of Byron M. Halfyard.)

Q. Whatever information they give, you report, is that right?

A. If we think it is pertinent.

Q. And in a case such as this, where the person is from another state—and I presume you have no office in Phoenix, do you? A. No, sir.

Q. —then, do you from time to time hire local representatives to report?

A. That is correct. [123]

Q. And did you do that in this case?

A. We did, sir.

Q. And did you get such a report?

A. We have had reports from Phoenix a number of times, from an agency there.

Q. And did you get one in March of 1954, if you know?

A. Well, I would have to examine this, to see.

Q. I think I saw one, that is the reason I am asking you.

The Court: Ordinarily we adjourn at this time.

Mr. Licht: I can certainly continue tomorrow. I did find it, anyway.

The Court: Do you want to put it in now?

Mr. Licht: Identify it.

Q. This document, which is on the form of Lyon Furniture Mercantile Agency, is dated February 23, 1954 and addressed to Southwest Credit Bureau in Phoenix. Is that one of the forms that you sent out? A. Yes, sir.

Q. And did you receive that back from them?

A. I presume on March 5, 1954.

(Testimony of Byron M. Halfyard.)

Q. And you presume that because there is a red stamp with that date on it, is that right?

A. Yes.

Q. And that would indicate the date it was received by [124] your office? A. Yes.

Mr. Licht: I would like to offer that next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 9 in evidence.

(Said document was marked Plaintiff's Exhibit No. 9 and was received in evidence.)

The Court: Then, we might recess for today. We will start at 10:00 o'clock tomorrow morning. At 12:00 o'clock tomorrow we will see how we are going along. Maybe we will take up again at 1:30, then, if we see we are short of time.

Mr. Licht: I anticipate, your Honor, that the plaintiff's case should be completed before or by noon tomorrow.

The Court: We will see how we get along.

Mr. Lindenbaum: And we have one or two witnesses and we should be through in the afternoon.

The Court: Well, we continued that other case until Thursday morning.

The Clerk: Until Thursday morning.

Mr. Licht: That will be just right.

Mr. Lindenbaum: Yes.

The Court: Well, we might guess it about right. It doesn't make any difference.

(And thereupon, at 4:03 p.m., an adjournment was taken until the following day, May 15, 1957 at 10:00 a.m.) [125]

Wednesday, May 15, 1957, 10:00 a.m.

The Court: You may proceed.

Mr. Licht: Will you take the stand again, Mr. Halfyard.

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Licht): Now, Mr. Halfyard, I believe when we ended yesterday we were talking about this report of December 29, 1953, which is Plaintiff's Exhibit No. 8, and I will ask you to look at it. I want to ask you a couple of questions about it. A. Yes.

Q. Would you tell me by examining that report what the rating was you had given to Mrs. Carrier?

A. 13-6.

Q. And what does 13 mean?

A. Inquire for Report.

Q. Does it have any other significance beyond that?

A. That is the only rule—that is the only definition shown in our reference book and the only known definition that I know for 13.

Q. So, when you assign a 13 to a store, that just means [128] Inquire for Report?

A. That is the official significance of it, yes.

Q. And is that what you intend when you write it down? A. That is correct, sir.

Q. And what does the 6 mean?

(Testimony of Byron M. Halfyard.)

A. Very slow payments.

Q. So that was the rating that you had assigned from the information that you had available to you at that time, is that correct? A. Yes, sir.

Q. Now, the next report, when was the date of the next report after December 29, 1953?

A. The next one I have in front of me here which I believe was the next one was March 9, 1954.

Q. Well, do you have anything in your file to indicate that there were any reports in between?

A. No, sir.

Q. And it is your best recollection that that is the next report?

A. That is the next one, as far as I know.

Mr. Lindenbaum: Your Honor, may I call the court's attention to that objection I made yesterday and the court's ruling that today there will be a motion made to amend the complaint.

The Court: Yes, he was going to do it either orally or [129] in writing, he said last night.

Mr. Licht: Yes.

Mr. Lindenbaum: Will it be understood that as far as the record is concerned, that any question with reference to reports other than of March 23, 1954 and April 18, 1955, we object to.

The Court: Yes.

Mr. Lindenbaum: Thank you.

The Court: And I understood you were going to amend orally or in writing.

Mr. Licht: I am, your Honor, but first I have to find out what reports there are.

(Testimony of Byron M. Halfyard.)

The Court: That is right.

Q. (By Mr. Licht): Then, this next report is March 9, 1954, is that correct? A. Yes, sir.

Q. And is that these two pages?

A. Yes, sir.

Mr. Licht: You can staple them together. I offer these, if your Honor please, as plaintiff's exhibit next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit No. 10 in evidence.

(Said document was marked Plaintiff's Exhibit No. 10 and was received in evidence.)

Q. (By Mr. Licht): Now, examining this report, Mr. [130] Halfyard, apparently the same paragraph is in it with respect to her having no experience and employing a manager. As far as you know, did you have any additional information with respect to that, at this time?

A. Not that I recall, sir.

Mr. Lindenbaum: May I call to the court's attention that Mr. Licht undoubtedly unintentionally misread that statement. It says "no previous experience." It does not say "no experience."

Mr. Licht: The wording is "no previous experience," that is correct.

The Court: All right.

Mr. Lindenbaum: Thank you, sir.

Q. (By Mr. Licht): In this report it says, "Since acquiring this business, Irene M. Carrier has not been disposed to furnish financial statements

(Testimony of Byron M. Halfyard.)

direct." Now, do you recall where you got that information?

A. Well, we at the time of an inquiry send out a statement blank to the subject being investigated and also, periodically, we send statement blanks to all names listed in the reference book.

Q. And didn't you also send this Plaintiff's Exhibit No. 9, which was your Lyon inquiry report from the Southwest Credit Bureau?

A. Yes, sir. [131]

Q. And I believe it states on there, doesn't it, that Mrs. Carrier refused to give a report, isn't that true?

A. That is correct, sir.

Q. Does that refresh your recollection as to where you got that particular bit of information?

A. This information came from the Southwest Credit Bureau. It states so right here.

Q. And is that how you included it in this report of March 9th?

A. Well, at the same time we had sent an inquiry presumably to Mrs. Carrier direct.

Q. Do you have a copy of that inquiry in your file?

A. If that statement blank hadn't been returned to us that would be the last we would have seen of it.

Q. Do you know whether or not you did in fact send one to Mrs. Carrier?

A. I don't know, but it is always the policy at any time of an inquiry to send a No. 1 form, a request for a statement. That is our main hope of

(Testimony of Byron M. Halfyard.)

receiving a financial statement. We would undoubtedly do that.

Q. Well, when you sent this form to the Southwest Credit Bureau, one of their functions would have been to ask for a report, too, wouldn't it?

A. That is correct, sir.

Q. And they apparently did and apparently the report [132] indicates that they were refused, isn't that correct? A. That is correct.

Q. Now, did you have available to you this report of March, this Plaintiff's Exhibit No. 9 which bears your received stamp of March 5, 1954, when you wrote this report of March 9, 1954?

A. I presume so, but I wouldn't know for sure.

Q. Was it a part of your file at that time?

A. That I wouldn't know. It should have been.

Q. One of your functions in preparing a report was to send to the Southwest Credit Bureau for information, is that right?

A. The clerk would do that.

Q. Working under you? A. Right.

Q. Now, your next report is dated March what, March 23rd, I believe? A. March 23rd.

Q. Is that this report (indicating document)?

A. Yes, sir.

Mr. Licht: May I offer that, your Honor, as plaintiff's exhibit next in order.

The Court: Yes.

The Clerk: Plaintiff's Exhibit No. 11 in evidence. [133]

(Testimony of Byron M. Halfyard.)

(Said document was marked Plaintiff's Exhibit No. 11 and was received in evidence.)

Q. (By Mr. Licht): Now, on your March 9, 1954 report, will you tell the court what your rating was of Mrs. Carrier at that time?

A. Also 13-6.

Q. Now, on your March 23rd report, which is now Exhibit No. 11, what is your rating of Mrs. Carrier on that report? A. 13-6.

Q. Now Mr. Halfyard, in your opinion is a 13-6 a correct rating for Mrs. Carrier, under the circumstances then present?

A. I would think so, yes, sir.

Q. Were you aware at the time you wrote those three reports that a certain arrangement had been made with creditors for the extension of the payment of past due accounts?

A. At the time the March 23rd report was written, it states here that Irene M. Carrier was granted an extension.

Q. So that you were aware of that, weren't you?

A. I was aware of that.

Q. Isn't it a fact, Mr. Halfyard, that the correct rating for somebody who has signed or made any such arrangement as that would be a 13 and not a 13-6?

A. I would think that that was a matter of opinion. As a rule, a 13 is given, but if slow payments were present, [134] I should think a 13-6 would be applicable. I don't think there is any hard and fast rule.

(Testimony of Byron M. Halfyard.)

Q. Wasn't it your opinion at the time you gave your deposition that a 13 and not a 13-6——

A. I think I said that in my opinion that a 13 would be——

Q. Well, has your opinion changed since then?

A. I don't think so. I don't think there is a great deal of difference between the two ratings.

Q. What does 13 mean?

A. Inquire for report.

Q. What does a 6 mean? A. Slow.

Q. And you testified I believe a few minutes earlier that a 13 had no connotation other than the fact just inquire for report?

A. Inquire for Report is the official connotation.

Q. Which doesn't mean anything good or bad as far as the person is concerned, does it?

A. It draws attention to the fact that the report should be inquired for and the credit man should make up his mind, after reading the report, as to what he does.

Q. And I will state again that the 13 in and of itself doesn't mean anything good or bad, it just means inquire for report, is that correct? [135]

A. That is the correct official connotation of the report, of the rating.

Q. Therefore, would you say that a 13 or a 13-6 would have been a proper rating during this period for Mrs. Carrier?

A. I would say so, yes, sir.

Q. Which one?

A. In most instances, a plain 13.

(Testimony of Byron M. Halfyard.)

Q. Then, why was a 13-6 in this instance proper?

A. I wouldn't remember. I wouldn't have any reason to know.

Q. Have you anything in your files to indicate how you learned there was an extension agreement between Mrs. Carrier and her creditors?

Mr. W. E. Catlin: One minute, please.

Mr. Licht: Sir?

Mr. W. E. Catlin: May I have a short conference with Mr. Licht?

The Court: Yes, sir.

(Whereupon Mr. Licht and Mr. W. E. Catlin conferred off the record.)

Q. (By Mr. Licht): Now, it appears, Mr. Halfyard, that there was as a part of your record, and I am sure that is correct, a copy of this extension agreement which was apparently attached to Mrs. Carrier's deposition, so we can wait a minute on that, and go on. [136]

Now, going on, so we can get the record complete while we are waiting, what is the date of the next report, Mr. Halfyard?

A. The last one we had was this one here (indicating document).

Q. This was March 23, 1954?

A. March 23, 1954.

Q. I believe it was April, 1955.

A. April 18, 1955 is the next one I happen to have here, yes.

Q. As far as you know, is that the——

(Testimony of Byron M. Halfyard.)

A. As far as I know, yes, sir.

Mr. Lindenbaum: Mr. Halfyard, I couldn't hear you.

The Witness: As far as I know, the report of April 18, 1955 was the next report compiled, to that of March 23, 1954.

Mr. Licht: And I would like to offer this, your Honor, as plaintiff's exhibit next in order.

The Court: All right.

(Said document was later marked as Plaintiff's Exhibit No. 12.)

Mr. Licht: And I will hold it until the clerk returns.

Q. Now Mr. Halfyard, it appears from this report that the rating is a 13, rather than a 13-6, is that correct? A. That is correct.

Q. Now, would you tell the court why there was a [137] change made?

A. Well, usually after an extension there is a 13 rating assigned without a credit rating or a capital rating. I don't know of any hard and fast rule, but that is usually the procedure we follow.

Q. Now, in this report which will be Plaintiff's Exhibit No. 12, of April 18, 1955, the third paragraph reads, "During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1,000," and so forth. Could you tell me where you got that bit of information?

A. Not directly. It must have been at my disposal at the time I wrote the report.

(Testimony of Byron M. Halfyard.)

Q. And it appears to be from what counsel says, and I think right, that you had a copy in your file of the extension agreement——

A. I believe so.

Q. Did you not? A. I believe so.

Q. As a matter of fact, there is still a copy that has been typed on your stationery in there, isn't there?

A. I haven't seen it this morning.

Mr. Licht: Excuse me. Your Honor, may I open this?

The Court: Yes.

The Clerk: It is the deposition of Irene Carrier. [138]

(The envelope containing said deposition was opened.)

Q. (By Mr. Licht): Now, here is an exhibit to Mrs. Carrier's deposition as the copy that counsel said was part of your file. Is that familiar to you?

A. That appears to be the same as this one here.

Q. And it is dated September 16, 1953, is that correct? A. Yes, sir.

Q. Now, do you have any way of telling when you came into possession of this document? I am not trying to mislead you or anything. Would it appear to you that you were in possession of that document when you wrote this paragraph referring to the agreement in the April 18, 1955 statement? A. It would appear so.

Q. And also in the March 23, 1954 report?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

\$1,000. Payments were made as agreed up to February 23, 1954."

Now, up to that point in that paragraph, does that refer to the moratorium?

A. Yes, the point the paragraph is bringing out is the moratorium and referring only in a general way to the extension which was in effect. We wouldn't reiterate or [141] repeat the extension agreement. That was already known.

Q. How was it known?

A. If it weren't known, it was brought to anyone's attention by the first paragraph there. The pertinent information there is the moratorium.

Q. At any rate, you didn't disclose the other terms of the agreement other than the fact that she was to pay a thousand dollars a month, she paid it for two or three months and then she stopped, is that right?

A. That is correct, sir.

Q. Do you think it would be important information for you to disclose, if you knew, how much the indebtedness was and how much had been paid on it?

A. I think it would be important enough to put in the report. I don't think at that particular time in March, when that report was written, it was important enough at that time. This particular paragraph refers to the moratorium. That was bringing it up to date.

Q. Now, your firm had placed with it for collection certain items by member organizations, had it not?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And one of the functions of your organization is to be paid a fee for collecting these items, isn't that correct? A. Yes, sir. [142]

Q. And in this case, do you know what your organization did with these claims that it had?

A. You want to know specifically if they were collected or not?

Q. No, not yet. What I want to know, what I am trying to get at is that you turned them over to an attorney in Phoenix, didn't you?

A. We turned them over to an attorney for the creditor, who acts for the creditor. We do not employ an attorney ourselves, in that capacity.

Q. Well, he was the attorney, Mr. Wilson in Phoenix, wasn't he?

A. He was an attorney used by the various other people that I know of who use him for similar work.

Q. Well, Lyon's used him for collection work, too, didn't they?

A. Well, sir, the creditor of Lyon, the creditor used him for collection, employed him. Lyon does not employ an attorney.

Q. As I understand the creditor employed him at your suggestion, didn't they?

A. I don't know what recommendations are made.

Q. Isn't it a fact that Mr. Wilson reported the progress of these collections to your office?

A. That is correct, sir. That is correct. [143]

Q. Well, that would indicate, wouldn't it, that

(Testimony of Byron M. Halfyard.)

you had forwarded the matters to him, wouldn't it?

A. I believe that is correct.

Q. All right. Now, I believe you have in your file a letter from Mr. Wilson with respect to these payments, which is dated December 18, 1953 and is stamped—it is dated December 16th and stamped December 18th. Have you ever seen that letter before? A. Yes, sir.

Q. Was that letter a part of the file when you prepared the March 1954 reports and the 1955 report? A. I wouldn't know, sir.

Q. Well, wouldn't the date stamp indicate that it was part of the file?

A. That would indicate that it had come into the office, to the collection department.

Q. Where else would it be, if it wasn't in the file?

A. The collection file and the credit file are two separate entities.

Q. And do you make use of the collection file?

A. Yes, sir, a copy of anything important to the credit department is given to the credit department.

Q. Now, have you read that letter? Will you please read it?

(The witness examines document.) [144]

A. Yes. I have read it.

Mr. Licht: Now Mr. Clerk, the April 18, 1955 report was the next in order which should have been marked. I would like to offer this, your Honor, as the plaintiff's exhibit next in order.

Mr. Lindenbaum: May I see it, please?

(Testimony of Byron M. Halfyard.)

Mr. Licht: Yes.

The Clerk: No. 12.

The Court: No. 12 received.

The Clerk: Plaintiff's Exhibit No. 12 in evidence.

(Said document was marked Plaintiff's Exhibit No. 12 and was received in evidence.)

Q. (By Mr. Licht): By the way, so that we can continue, Mr. Halfyard, does your file indicate whether or not these claims that were placed for collection with your firm were collected?

The Clerk: Plaintiff's Exhibit 13?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Said document was marked Plaintiff's Exhibit No. 13 and was received in evidence.)

The Witness: I know there were claims collected. I don't see any of the slips here I usually get to indicate they were.

Q. (By Mr. Licht): Well, as I recall in your deposition you testified there were some eight or ten or twelve loose [145] slips in your file which indicated that the accounts had been collected; do you recall that?

A. If I said that, that was so at the time, yes, sir. I don't see them here now.

Q. Perhaps we can look for them at the recess and let us go on with the other point. I would like to ask you again whether or not you feel that it would have been an important part of your report to inform your members whether or not Mrs.

(Testimony of Byron M. Halfyard.)

Carrier was living up to the terms of the agreement of extension when you prepared the March 9, 1954 report?

A. If I had had that information I think it would have been important.

Q. So that your testimony, then, is that if you had that information you would have included it in the report?

A. That would depend on the circumstances at the time. I don't know how important it was at the moment.

Q. Well, referring to this letter from Mr. Wilson of December 16th, first reading the first sentence of the second paragraph:

"The payments that were received were pursuant to the agreement which the creditors signed and under this agreement the debtor is to pay from now on \$1,000.00 on the 15th of each month, which is to be distributed among all of her creditors. I understand there are about sixty creditors." [146] Then skipping to the third paragraph:

"I understand Mrs. Carrier has just made her second \$1,000.00 payment and that therefore in a few days we should receive the distribution."

Now, do you feel that if you had had this information available to you when you prepared the March 9th report, you would have included it.

Mr. W. E. Catlin: Objection, your Honor, I feel that this is argumentative inasmuch as in direct testimony Mrs. Carrier testified that she did not

(Testimony of Byron M. Halfyard.)

live up to the terms of the agreement in making a payment in March.

The Court: I will overrule the objection. You may answer. You may answer the question.

The Witness: What was the question again, Mr. Licht?

Q. (By Mr. Licht): The question is, if you had had available to you when you prepared the March 9th report the information that at that time Mrs. Carrier was living up to the agreement, would you have included it in your report?

A. At this time I would think that I would have included it in my report.

Q. Wouldn't you, as a matter of fact, have considered it an important bit of information to hand on to your subscribers?

A. I would have thought it would have been more unusual if she hadn't lived up to the agreement. The agreement [147] had been made. There was nothing said that the agreement hadn't been lived up to. In the next report we bring out the fact that she, after three payments, asked for a moratorium.

Mr. Licht: Yes.

The Witness: An agreement was made. I see no reason, in thinking it over, why we should have stressed the point that she was living up to it. It was taken for granted that she was living up to it.

Q. (By Mr. Licht): Now, referring to the second page of the March 23, 1954 report, under "Trade Investigation": it says, "During the latter

(Testimony of Byron M. Halfyard.)

part of 1953, payments are reported to have been slow."

Would you show me in your file some of those trade investigations in the latter part of 1953?

A. Yes, sir. (The witness indicates documents.)

Q. Now, here is this first one which says, "Subscriber No. N633." That refers to one of your subscribers, is that correct?

A. Yes, that is correct.

Q. Now, that is dated December 7, 1953, isn't it? Would you say, what does that disclose?

A. Nothing.

Q. And this one, No. 137 on the same date, what does that disclose? A. C.O.D. [148]

Q. And 10-22, it says "Slow," "30 days, slow."

A. 30 days and a high credit of \$700; slow, 30 to 90 days; slow, 90 days; placed for collection.

Q. This was a C.O.D.? A. C.O.D.

Q. Now, I see here a letter dated September 22, 1953, addressed to you, from David E. Wilson, which says in the first paragraph, "I enclose an extension agreement which is self-explanatory." Would that be the agreement that we talked about earlier, that is a copy that is attached to Mrs. Carrier's deposition? A. I would think so, yes.

Q. And here is a letter also from Mr. Wilson of October 8, 1953, further discussing the question of the distribution, and so on, and it says, "At this time there is a 43 per cent distribution check awaiting action by creditors." Is that correct?

A. That is correct.

(Testimony of Byron M. Halfyard.)

Q. And was that information available to you when you made the reports after that?

A. These letters were sent to the collection department and I don't know if I had received a copy of that time or not.

Q. But they were in the collection department, weren't they?

A. They were in the collection department.

Q. Now, I believe in your report of April 18, 1955, there is a paragraph which I would like to read to you:

"Irene M. Carrier, through her attorney, during August, 1954, offered creditors a 50% compromise settlement, both on open accounts and those accounts that were in judgment. Some of her creditors are reported to have accepted this offer."

Will you please tell me where you got that bit of information? That is one of the exhibits that is in evidence.

A. Yes. I don't seem to have a copy of that. I don't have any recollection of it, excepting it must have been in my possession at the time I wrote the report.

Q. But it isn't in the file now, is it?

A. As far as I know, it isn't.

Q. Well, you have spent some time in preparing to testify in this case, haven't you?

A. Not too much time, no.

Q. Well, have you read the file?

A. Not all of it. I have gone through it several times, but——

(Testimony of Byron M. Halfyard.)

Q. As far as you know, there is nothing in that file which would indicate an offer of a 50 per cent compromise settlement, is there?

A. As far as I know, there isn't.

Q. And that would apply to both open accounts and to [150] accounts that were in judgment, isn't that correct?

A. I don't have a copy of that report in front of me now.

Q. Of what report?

A. Of what you are reading there.

Q. Of April 18, 1955.

A. I looked through it already and I haven't seen a copy, but it may be still here.

Q. It may be over here on the clerk's desk.

A. I have it here.

Q. Oh, you do have it? A. Yes, I do.

Q. Now, that appears to be somewhat different than this photostat that I have, and that paragraph seems to have been deleted, is that true?

A. That is the last paragraph of the April 18th report. This is a corrected first page of that report.

Q. When did you correct that first page?

A. I wouldn't know the date, because there is no date on the report, the date that it was corrected. The date on the report is the same date as the original one that was written on that date.

Q. Now, do your records indicate to whom the original April 18, 1955 report was sent?

(Testimony of Byron M. Halfyard.)

A. I believe so. We have a record of every report [151] that is mailed out.

Q. Well, do you have a separate record for the April 18 report that was sent out before the revision was made and after the revision was made?

A. When the report is sent out, the folder is stamped with the date it was sent out and to whom.

Q. Is there any way you can tell——

Mr. W. E. Catlin: Mr. Licht, and if your Honor please, I have just been advised that we have another letter that got out of the file in some way. I don't know how it did.

The Court: All right.

Q. (By Mr. Licht): Is there any way you can tell, Mr. Halfyard, what persons received this uncorrected April 18th report?

A. I could tell you everybody received any—the report, all the reports, but I may not be able to tell you who received that report, unless it was stamped a day or two after it was written.

Now, if this report were written April 18th and the corrected report was compiled two days later, and the folder were stamped two days later, it would indicate that they had received the corrected report. I wouldn't be sure which report they had received.

Q. Do you know why it was corrected?

A. I don't know, sir. [152]

Q. Were there any other corrections made other

(Testimony of Byron M. Halfyard.)

than the deletion of that paragraph of which I spoke earlier?

A. Well, I'll—you have the original one there. That is the only one I noticed when I looked at the report that you had.

Q. Now, I refer you, if I may, to the September 22, 1955 report, which would be some six months or so later, isn't that correct?

Mr. Licht: Your Honor, I would like to offer this, which is the uncorrected April 18th report as next and then the corrected one as the following exhibit, if I may.

The Clerk: No. 14.

The Court: Yes, received.

The Clerk: Plaintiff's Exhibit No. 14 in evidence.

(Said document was marked Plaintiff's Exhibit 14 and was received in evidence.)

Mr. W. E. Catlin: With your Honor's permission I would like to add this letter to the file.

The Court: Yes, you may do so.

Mr. Licht: What letter?

Mr. W. E. Catlin: Apparently this letter is not in the file. There is an original signed copy of it.

The Court: Well, let Mr. Catlin add it.

Mr. Catlin: Thank you.

Q. (By Mr. Licht): Now, where is this April 18th report? [153]

A. You asked for the September 22nd.

Q. Yes, and first the April 18th. This is the corrected April 18th, right?

(Testimony of Byron M. Halfyard.)

A. That is right.

Mr. Licht: Now, this is the next in. The September what?

A. September 23rd, but I don't see that here. It is possible that it is here.

The Clerk: This will be your No. 15?

Mr. Licht: Yes.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Said document was marked Plaintiff's Exhibit 15 and was received in evidence.)

Mr. W. E. Catlin: Do you have your Exhibit No. 14 there, you say?

The Clerk: I have 14 as a photostat.

Mr. Licht: That is right. That is the uncorrected April 18th?

The Witness: April 18th.

Q. (By Mr. Licht): Well, to save a lot of time, I have a photostat of the September 22, 1955 report. I will ask you to examine that and see if that is one of the reports you made?

A. I didn't personally make this report.

Q. That was a report made by your organization—— [154]

A. Yes, sir.

Q. ——of Mrs. Carrier's business, wasn't it?

A. Yes, sir.

Q. Now, I will read the second part of the second paragraph of that report, which says, "During August, 1954, Irene M. Carrier is reported to have offered creditors a 50% compromise settlement on balances due both on open account and accounts which were reduced to judgment."

(Testimony of Byron M. Halfyard.)

Where did you get that information?

A. I didn't write that report, and previously when you asked me that question as referring to the other report, I don't recall where I got the information, but it must have been available to me at the time I compiled the report. I didn't compile that one.

Q. Now, in that report you refer to—now I am looking at the April 18, 1955 report, it says:

“Collection Record: During 1953, eight items of collection were placed with Agency.”

And that is also included in the September 22, 1955 report, is that right?

A. That is correct. I recall that, that is right.

Q. Now, what does that mean to you, Mr. Halfyard?

A. We only publish, as a rule, the details of a collection item for two years, and after that we just mention [155] that one item or two items were placed for collection over a period of years; it might go back any number of years.

Q. And do you ever mention in there whether or not the matters were paid or not?

A. Never in a paragraph of that type.

Q. You never mention in a paragraph whether they were paid?

A. It is presumed that they were paid. They refer actually to slow payments. It's a trade report of the business at that time. That is past history.

Q. Well, would you report that they weren't paid, if they weren't paid?

(Testimony of Byron M. Halfyard.)

A. No, not after two years.

Q. Well, this wasn't after two years; this is still '54, is it not, and '55, I believe.

A. This was '55, and the report was '55, and this was during '53.

Q. Well, if you read that as a credit man or if you wrote it, would you intend to convey that it was paid or that it wasn't paid?

A. In reading this to me it would mean that they were paid.

Q. And you would never in a report on a situation like that report that it was paid?

A. No. I have never known that to be done.

Q. All right. Now, was your territory the Arizona territory?

A. That and a number of other territory.

Q. I am going to show you another document which appears on the stationery of Lyon-Red Book and it says at the top, "House of Enchantment, Tucson, Arizona, April 1, 1955" and ask you if you have ever seen that report on that concern?

A. I wouldn't know, sir.

Q. That is your territory, isn't it?

A. It doesn't mean that I report—there are several other people who do report in that territory. While it is ordinarily my territory, it is no more my territory than Washington or Nevada or any other western state.

Q. Will you *please* the paragraph of that under the wording "Collection Record"?

(Testimony of Byron M. Halfyard.)

A. Yes, sir. "June 29, 1954, Claim" so and so. Do you want the number?

Q. No.

A. (Continuing): "\$186.75 placed with Los Angeles office for goods sold from March 3rd to March 17, 1953, collected by Agency July 24, 1954."

Q. So this is an example of where you did report to the people that they were collected?

A. That was within a year. We list them whether they are collected or not within a two year period, all the details [157] just like that, but, when you go back beyond two years we say 15 items or one item and so forth, for that one year. That is past history. The credit man isn't interested excepting knowing how in a general way the bills were paid during that time.

Q. I believe you testified a few minutes earlier, Mr. Halfyard, that you never report whether the items are paid or not?

A. Oh, no, sir. We always——

Mr. Lindenbaum: One minute.

The Witness: Yes, sir.

Mr. Lindenbaum: Your Honor, although this witness is an adverse witness, concededly he has not shown any hostility and I respectfully submit that the attorney for the plaintiff cannot argue with the witness but must accept the witness' answers unless he shows he is a hostile witness.

The Court: Well, he called him under that section, but I think maybe we can proceed all right.

(Testimony of Byron M. Halfyard.)

The Witness: I will be glad to clear up that point, Mr. Licht.

The Court: All right, we will let him clear up that point.

Mr. Licht: All right.

The Witness: For two years we list a collection item in detail. When the item is paid, it is listed as collected by [158] Agency, collected by attorney, and so on, and on the date it is collected. After two years, the item is listed as one item or two items, whatever the case may be, were or was placed for collection during that year, and the detail is not given or whether it was paid or not.

Q. (By Mr. Licht): Now, will you show me where in the 1953 reports you mentioned anything about items being placed for collection with your firm?

A. There are no items in that report.

Q. I show you December 29, 1953 report and I read under "Collection Record," "No collection claims placed against Irene M. Carrier." Would that cover the year 1953? There was only one more day left in the year, wasn't there?

A. I would say so at that time.

Q. So that December 29, 1953 you had no information available that any items were placed for collection against Mrs. Carrier, at that time?

A. It would appear so from this report.

Q. Now Mr. Halfyard, do you know what Mrs. Carrier's rating is today with your firm?

A. I think it is——

(Testimony of Byron M. Halfyard.)

Mr. Lindenbaum: One minute. I object to that as being incompetent, irrelevant and immaterial to the issues in this case, what her rating is today.

Mr. Licht: Your Honor, if I may be heard, the purpose [159] of it is only to lay a foundation for asking the next question which I hope to find out in another question. My understanding is that the rating is substantially changed. I would like to find out what information he has had since that time to change it, it being my point that there was no other information and therefore it follows that the rating she now has would have been the proper rating at the first time.

The Court: I will overrule the objection. You may answer.

The Witness: The rating is 13-P-2.

Q. (By Mr. Licht): What does that mean?

A. 13 means Inquire for Report. P means moderate financial reponsibility. 2 means prompt payments as an average.

Q. What information do you have at this time which gave you to make that rating?

A. Well, information available to us; we have known and show in our reports that Mrs. Carrier's financial condition, condition of her business has improved. We have our trade checks to indicate the trend of her payments, that they have improved from slow to prompt.

Q. And that is what your trade checks indicate?

A. That is what our trade checks indicate. I haven't written this report recently, but we only

(Testimony of Byron M. Halfyard.)

base a "2" rating on information received from suppliers. [160]

Q. Now, the September 1955 report, Mr. Halfyard, I believe that sets forth a balance sheet which I presume was supplied by Mrs. Carrier, wasn't it?

A. This report, as I said, I did not compile it. It would indicate that it came by mail.

Q. From Mrs. Carrier most likely?

A. From Mrs. Carrier.

Q. Now, what is meant in the report by the words "current and liquid ratio"?

A. Liquid ratio means the ratio between the current liabilities and the adjusted current assets.

Q. By current liabilities you mean those liabilities which are payable within a period of say 30 days?

A. No. Within a period of twelve months.

Q. So that anything that is due within twelve months after the date of the balance sheet would be current liabilities, correct?

A. For the current year, yes.

Q. And current assets would be what?

A. Cash receivables for a 90-day period and merchandise inventory.

Q. Now, taking the cash receivables and merchandise inventory——

A. Cash adjusted receivables.

Q. Adjusted receivables? [161]

A. Right.

Q. Which means they would make an allowance for cash?

(Testimony of Byron M. Halfyard.)

A. No. It would only be a quarter. On installment accounts that were due over a period of a year, we would regard a quarter of those as being due current or collectible within 90 days.

Q. And discount say three-quarters of the receivables? A. That is correct.

Q. All right. So we take a quarter of the receivables, the cash, and the merchandise, and those are the actual assets?

A. The current assets.

Q. And you would balance that as against the liabilities which would include all items due within a year, is that correct? A. That is correct.

Q. Now, what in your opinion in a rating would be a good ratio between those, as a favorable ratio?

A. A favorable ratio would be if the total current assets equaled a hundred and the total current liabilities were less than a hundred, that would be the liquid ratio.

Q. And when would you consider it a good liquid ratio?

A. Well, it improves right up to the point where they are all assets and no liabilities.

Q. All right. Well, would you consider two to one, [162] that is, if the current assets were twice as much?

A. One to one is the borderline. It is considered normal.

Q. And if the current assets were twice as much as the current liabilities, would it be considered a good one?

(Testimony of Byron M. Halfyard.)

A. It would be considered a two to one ratio.

Q. Would you consider that a good one?

A. That would be a fairly good one.

Q. Well, what would be an accepted standard?

A. If the assets say in round figures were ten thousand and the liabilities two or three, it would be a very good one.

Q. What is meant by this term "accepted standard"?

A. By one to one; in other words, the current liabilities did not exceed the adjusted current assets.

Q. So that anything where the current assets——

A. That is the liquid ratio you are asking me about, now——

Q. We are talking about the liquid ratio.

A. Yes.

Q. As long as the liquid current assets exceeded the current liabilities, you would say that was about the accepted standard?

A. That is correct.

Q. For current assets. [163]

The Court: We will stop and take the morning recess at this time.

(Recess.)

The Court: Just come to order. Have the witness resume the stand.

Q. (By Mr. Licht): Now Mr. Halfyard, I think when we left off before the recess we were talking about report of September 22, 1955. I don't believe it has been offered, your Honor.

I would like to offer it as Plaintiff's Exhibit 16.

(Testimony of Byron M. Halfyard.)

The Court: No. 16. Received.

The Clerk: 16 in evidence.

(Said document was marked Plaintiff's Exhibit 16 and was received in evidence.)

Mr. Lindenbaum: You are offering an exhibit in evidence?

Mr. Licht: Yes, the September 22nd report.

Mr. Lindenbaum: Of September 22, 1955?

Mr. Licht: Yes.

Mr. Lindenbaum: Your Honor, it is understood there is the same objection as to any report not pleaded.

The Court: Yes, that is right.

Mr. Lindenbaum: It consists of a report subsequent to the action, it having been instituted already.

The Court: Yes. I will overrule the objection.

Mr. Lindenbaum: Exception. [164]

Q. (By Mr. Licht): And we were talking about this question of current ratios. Now, am I correct in saying that accepted standard, as used in your organization for current ratio would mean that the current ratios as you define them would be at least equal to the current liabilities as you defined them?

A. That was liquid ratio you were talking about.

Q. All right, liquid. Now, is that the correct definition of liquid? A. That is correct.

Q. What is the correct definition of current?

A. Two to one.

Q. The accepted standard for current ratio

(Testimony of Byron M. Halfyard.)

would be that the current assets, as you defined them, would be at least twice——

A. That is correct.

Q. ——the current liabilities as you define them, right?

A. Oh, you have used the words liquid and current sometimes to mean the same thing. There is just a slight difference. In the liquid ratio it is the cash and the adjustable receivables as compared to the current liabilities.

In the current liabilities, it is the cash and the adjusted receivables and the merchandise in relation to the current liabilities. [165]

Q. At any rate, the accepted standard for what you refer to as current would be two to one.

A. Two to one for current.

Q. And liquid would be one to one?

A. One to one.

Q. Now, I am going to ask you to examine this information contained in this report of September 22nd and tell me what the liquid ratio is as appears from that statement?

A. I would say the liquid ratio was above standard.

Q. Well, what would you say in terms of dollars, roughly? Just round it out.

A. I would say it was 1,800 to 4,500.

Q. 4,500 for assets? A. For assets.

Q. And 1,800 for liabilities? A. Right.

Q. And so would you say that the current ratio

(Testimony of Byron M. Halfyard.)

was also above standard or above, to use your statement? A. I would say so, yes.

Q. Now, I am going to show you the report of April 18, 1955, which you did prepare, didn't you? You prepared this report, didn't you?

A. Yes, I did.

Q. Now, that appears to be the same financial information, because it refers to March 20, 1955, doesn't it? [166]

A. It's the same statement.

Q. That is the same statement. So your testimony would be the same as to that, wouldn't it?

A. That is correct.

Q. Would you please tell me how you concluded, when you wrote the statement with this phrase: "Current statement shows liquid and current ratio sub-standard, but net worth ratio above the accepted standards."

A. That is not correct.

Q. Now, there is one thing that seems to be not clear in my mind, Mr. Halfyard, and I would like to, if I may, just read a few paragraphs from your deposition and ask you if this is correct now. I am reading from page 14, line 12:

"Q. I show you a letter dated December 16, 1953, from David E. Wilson to your firm and stamped by your firm December 18, 1953, which is attached to your report of December 29, 1953, and ask you to examine that, if you will.

"(Witness examines document.)

"A. Yes, sir, I have examined it."

(Testimony of Byron M. Halfyard.)

Now, this is that same letter, is it not, Mr. Halfyard?

A. Yes, sir.

Q. And would you identify by the tag what its exhibit number is? A. Exhibit No. 13. [167]

Q. All right, I will go on:

“A. Yes, sir, I have examined it.

“Q. Would I be correct in assuming that you had read that report sometime within a few days of its receipt—that letter, I mean, not the report?

“A. No, sir, you wouldn’t.

“Q. Well, wouldn’t you say that it would be part of your job and of interest to you to know whether or not a creditor who had made arrangement about a debt or had made arrangement with creditors for payment was living up to that agreement or not?

“A. There was no mention in the December 29th report of any agreement with creditors, so I presume at that time I knew nothing about it.

“Q. Do you have any idea how these papers happened to become paper clipped together?

“A. These letters are to the Collection Department and I presume they were clipped together because of the nearness of dates.

“Q. But it has nothing to do with the documents used to compile the report; is that correct?

“A. It would appear that the information wasn’t available at the time this report was compiled, as there is nothing in the report to indicate I was aware of the existence of this letter. [168]

(Testimony of Byron M. Halfyard.)

“Q. Wasn’t available to whom?

“A. To me.

“Q. And had it been available to you do you think that it would have been a proper thing to have included in your report?

“A. I would say yes.”

Now, would your testimony be the same today as it was then?

A. Well, I answered that question without giving it thought. It’s pertinent information and ordinarily it would be part of a report, but in this report as we brought out this morning, as I had written, the important thing was to bring out the terms—there was moratorium and she hadn’t lived up to the agreement. It would depend on whether at the time I thought it was important enough to put in. The circumstances would make a difference. Ordinarily it’s information that could be used.

Q. Well, in the March 9th report, Mr. Halfyard, you hadn’t yet received notice of the moratorium, had you, or the request for moratorium?

A. If it were not in the report, we hadn’t received it, I presume, yes.

Q. So then referring to the same questions as to the March 9th report which would be at a period before you knew about the moratorium, would your answers to that be the same [169] as they are in the deposition?

A. The answers I gave in the deposition were at the time what I thought was correct, and they

(Testimony of Byron M. Halfyard.)

would be the same today under the same circumstances.

Q. Now referring again to this form, Plaintiff's Exhibit No. 9, which is a Lyon Furniture Mercantile Agency form, I am going to read from under the heading "General Information," which seems to be on the back side of it, and I will ask you whether or not this you would feel something which would be important to include in your report:

"She has reduced indebtedness from around \$50m," and "50m" I presume means 50,000, "to 15m and in this new location she has a fine opportunity due to location and appropriate type of merchandise."

Is that information you received from Southwest something you would feel of importance to your member firms to report?

A. Well, we would have to weigh that information. We don't always take on face value the information some local agencies give us. It is often at variance with the facts.

Q. Well then, your best recollection would be that you weighed this information and discarded it?

A. If I had seen that information at the time, and I don't recall having seen it, that is a long time ago; that might have come to me some days after the report was compiled.

Q. Well, the stamp on it says "March 5, 1954".

A. Well, that doesn't mean anything. Sometimes the folder isn't available and sometimes there is a

(Testimony of Byron M. Halfyard.)

lot of material that is being looked up at the time. It depends on how——

Q. But before you compile a report, don't you first gather what information there is in your offices?

A. Yes, the file clerks are supposed to put the information in the folder, any information.

Q. If you don't have it in the folder, you don't have it before you, is that correct?

A. That is correct.

Q. Now, on the front of this document, in answer to this question, "Former business connections, or where and in what capacity employed?", it says, "Carrier Furniture Company for many years." What would that mean to you?

A. Was that inquiry sent out on Frank Carrier or on Mrs. Irene Carrier?

Q. You tell me.

A. He is referring I presume to the business Carrier Furniture Company for many years. I would take it that he meant that the business had been in existence—"Former business connections," and where.

Q. "or where and in what capacity employed?" Now, would you take that to refer to the business or to the person? [171]

A. I would take it to refer to the person connected with this business for many years.

Q. And whose name appears?

A. Irene Carrier.

(Testimony of Byron M. Halfyard.)

Q. All right, just one more thing. There is a telegram which I believe you sent.

A. There is one here I saw.

Q. Is this a copy of the telegram that you sent to him requesting that report?

A. I would think so.

Q. And would that refresh your recollection as to whether or not you had this report when you made the March——

A. No, I wouldn't know that.

Q. Doesn't it appear from the telegram that you had asked him for it?

A. Specifically for the information, yes.

Q. And you were waiting for the report until you got the information, weren't you?

A. It would appear that way.

Mr. Licht: I have nothing further.

Mr. W. E. Catlin: Are you through?

Mr. Licht: Yes, you may cross examine.

Cross Examination

Q. (By Mr. W. E. Catlin): You just answered a question regarding the fact [172] that information was at your disposal in the March 23, 1954 report, that Mrs. Carrier had a new location. Is this correct? In 1954.

A. In the report of 1954?

Q. Yes, at the time of the writing of the March 23, 1954 report, I believe you answered that she had moved to a new location, and you were asked whether or not you thought this would be the type

(Testimony of Byron M. Halfyard.)

of information that you would include in the report?

A. I don't recall having been asked the question about her moving at all.

Q. A favorable location.

Mr. W. E. Catlin: Didn't you ask about a favorable location?

Mr. Licht: I read this sentence that did refer to a favorable location.

Mr. W. E. Catlin: Well, I have here a copy of the 1954 report.

A. Mr. Licht just read this from this form here.

Mr. W. E. Catlin: Yes.

A. Yes, that is correct.

Q. Yes, and you stated that in your opinion this type of information would normally go into a report. Now, isn't it true that in the report you did put this information?

A. The report says, "She recently moved to new quarters in a more favorable area for business of this type."

Mr. W. E. Catlin: Thank you.

The Witness: That is correct. [173]

Q. (By Mr. W. E. Catlin): Now let us go back to your background and history, Mr. Halfyard. How long have you been in credit reporting business? A. About 20 years or so.

Q. How long have you been employed by the Lyon Company? A. Since September 1946.

Mr. Licht: Your Honor, excuse me. Before we go into this, I have no objection to the witness be-

(Testimony of Byron M. Halfyard.)

ing continued on, but I would like to have it for the record that he is the defendant's witness and he is called as his witness.

Mr. W. E. Catlin: I am cross examining him.

The Court: He is cross examining him on his testimony. I will overrule the objection. Go right ahead.

Q. (By Mr. W. E. Catlin): And during this entire period with the Lyon Company, what has been your particular function?

A. Principally credit reporting.

Q. How many credit reports do you write a week? A. I would say 60 to 80.

Q. How many credit reports would you estimate, the number of credit reports you have written in your Lyon career?

A. Well, maybe 35,000 as a guess, a few one way or the other.

Q. In your guess, 35,000?

A. Yes, I would say that was reasonable.

Q. In your function as a report writer, what prompts [174] you to write a report?

A. A credit inquiry from one of our subscribers.

Q. From one of your subscribers. Are you familiar with the method under which the Lyon Agency does business as far as credit reports are concerned? A. Yes.

Q. Do you say that an inquiry from a subscriber is the thing that motivates the creation of a report? A. That is correct.

Q. Do you ever write a report for which you

(Testimony of Byron M. Halfyard.)

have not had an inquiry; in other words, do you ever create reports in which there are not inquiries involved? A. Occasionally, yes.

Q. And what is the purpose of these reports?

A. To make the report available to anybody who may inquire in future, any information furnished to us voluntarily by a new person, for example, going into business, coming in and asking to be listed.

Q. I see. Is this report ever sent out to anybody or a subscriber without an inquiry?

A. Not that I know of.

Q. Is there ever general distribution of reports to subscribers?

A. Certain reports are distributed to subscribers who have inquired previously for the report.

Q. But this again is based upon the inquiry for a report?

A. No. It is voluntarily furnished in the case of a new statement coming in and the report is written, it is voluntarily furnished to a subscriber who recently asked for the report, who had originally asked for it, that is correct.

Q. He had originally asked for it?

A. He had originally asked for it.

Q. He had asked for the report to be transmitted to him? A. That is correct.

Q. And this is merely additional information on that report? A. Yes, sir.

Q. Now Mr. Halfyard, I have here what purports to be agreements between Lyon Furniture

(Testimony of Byron M. Halfyard.)

Mercantile Agency and individual concerns, American Furniture Novelty Company, J. S. Greene Company, B. F. Huntley Furniture Company, Fine Arts Furniture Manufacturing Company, Caro & Upright, Inc., Charm House, Ltd., and Sanford Furniture Company. Would you examine these documents and tell me whether or not they were the subscription agreements under which these particular people subscribed to the services of the Lyon Agency?

A. Yes, sir. I saw them as you put them down. Those are the subscription agreements. [176]

Mr. W. E. Catlin: Your Honor, I would like to offer these as defendant's exhibit first in order.

The Court: A.

Mr. W. E. Catlin: Defendant's Exhibit A.

Mr. Licht: I have no objection.

(Said documents were marked Defendant's Exhibit A and were received in evidence.)

Mr. Licht: Could I just ask one question on voir dire as to them?

The Court: Yes.

Voir Dire Examination

Q. (By Mr. Licht): Mr. Halfyard, do you know if these are all of the persons who requested reports on Mrs. Carrier's credit?

A. I don't know, sir. I have never seen those forms before, those particular ones.

Mr. W. E. Catlin: If the Court will bear with me for just a moment.

(Testimony of Byron M. Halfyard.)

(A short intermission.)

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, when you receive a request for a report from a subscriber, what procedure do you follow in your normal routine?

A. Well, the inquiry goes to a clerk and the clerk [177] obtains the report folder which is taken to another clerk who determines if the report is ready to be distributed to the subscriber or if it requires additional information; whether it is possible to send it out at all is the first thing to determine; secondly, whether it can be sent out with a further investigation to follow; or whether it can be sent out and complete the inquiry without any more investigation.

Q. Now, you referred to the report folder. Would you please explain to me what you mean by this term?

A. A report folder is an ordinary cardboard folder with the name of the business typed on it and the current master copy of the report in the folder.

Q. Now, this of course, Mr. Halfyard, is assuming that there has been a prior report. What procedure do you follow when you have no prior report?

A. When the inquiry is received we determine whether we have no prior report and if it is established that there is no prior report, we send the subject of the inquiry a form requesting informa-

(Testimony of Byron M. Halfyard.)

tion, a statement blank form and a number of questions, a questionnaire.

Q. I see.

A. We also send to the local bank or several banks if it is a moderate town, a form requesting information from them.

We also ask the person sending in the inquiry for any [178] information he may have and in a great many cases we send it to a local credit bureau or even a national credit bureau that does that type of work.

Q. Am I correct in saying that the replies that you receive from these sources are then the contents of what makes up, from that time——

A. That is correct.

Q. ——your report folder?

A. That is correct.

Q. And when you have one report that has already been issued, then, the report itself goes into the folder?

A. That is right, and the other information is filed away.

Q. When you have a report and in existence and you receive a request for a report from a subscriber and the report is say five months old, would you write a new report for this subscriber?

A. Between five and six months we would write an additional report; and if it were necessary, if the information were important enough, we would completely revise the report.

Q. Now Mr. Halfyard, supposing that in the

(Testimony of Byron M. Halfyard.)

interval of the original publication of a report and the time of this inquiry you had received additional important information from your stated sources, would you revise the report before [179] the five or six month period?

A. It would depend on the importance of the information.

Q. Assuming that it is very important information?

A. As a rule, yes.

Q. In other words, if you received information of sufficient import then in your opinion it would be necessary to credit men, you would revise the report if it had been only one week old?

A. That is correct.

Q. Now, supposing you went to your folder and you found that you had very little information and that it wasn't too current, would you simply take this information and create a report out of it?

A. No. We would use every means at our disposal to get additional information, including picking up the telephone and phoning.

Q. Do you as a matter of record make a note or comment in the file any place that you made a telephone call?

A. In pretty near every instance, my telephone notes are on the folder part of the data.

Q. In other words, in the report folder?

A. Not in the report folder, but in the information that has been filed away, which is kept two years.

Q. It would be your handwritten memorandum?

(Testimony of Byron M. Halfyard.)

A. That is correct. [180]

Q. But you would make no special notation on the folder itself?

A. Oh, no, not on the folder, no.

Q. Now, when you make a report at the request of a subscriber, do you make a notation or a record of the fact that a report has been sent to a particular subscriber?

A. The mailing room clerk always stamps the subscriber's number on the folder together with the date that the report was sent.

Q. And this is done in every case?

A. I suppose once in a million it could be missing, but it's a hard and fast rule.

Q. As a matter of rules and custom of the business?

A. Oh, absolutely, because it is more than just a record of that. It is a reference.

Q. I have here what purports to be a folder on the Irene M. Carrier file.

(Mr. Catlin hands file to Mr. Licht.)

Mr. Licht: All right.

Q. (By Mr. W. E. Catlin): Now, I have here a folder entitled "Irene M. Carrier." Is that the folder we have been speaking about in this particular instance? A. Yes, it is the folder.

Q. And does it have notations on the front as to the persons who received reports and the dates they were sent? [181]

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. Can you tell me from this document who—well, let me ask you specific questions on that.

Can you tell me from that folder if a report was sent to Sanford Furniture Company?

A. What is the subscription number of Sanford Furniture Company?

Q. You have the contracts. Oh, excuse me. Will you examine the contracts and see if you have information as to subscription numbers thereon?

A. Yes, sir, I have.

Q. Now, taking the individual contracts and taking the name Sanford Furniture Company, taking the code number on it, will you, on your file, and tell me whether or not a report was sent to them?

A. Yes, sir, it was.

Q. That report was sent at the request of the Sanford Furniture Company?

A. Well, this Sanford Furniture Company is a High Point subscriber. The report would be requested of the High Point office. The High Point office would send them the report.

Q. The High Point office would send them the report?

A. That is correct.

Q. How do you get the notation? Do they send you a request through on it? [182]

A. A report of this nature, a copy is always sent to the High Point office, and as inquiries are received by the High Point office they are in a position to send copies directly to their subscribers.

Q. Your file, the file in your possession would not reflect this number, then, is that correct, Mr.

(Testimony of Byron M. Halfyard.)

Halfyard? A. This file here?

Q. Yes.

A. Yes, it would, because if the High Point office were requested to furnish a report and they had it in file, they would send it out to the subscriber and also send us a ticket to put the number on our report. If they did not have a current report, they would send to us for a report, and then we would at that time put the number on.

The Court: Well, it is after 12:00 o'clock, so we might adjourn and make it 2:00 o'clock.

Mr. Licht: Your Honor, there is one thing that might be helpful, if he could during the lunch hour identify by number these people listed on their book or something you have.

The Witness: It is right here.

Mr. Licht: I mean there are many names on that page and if you have some record in your office which would tell you the names of each of the manufacturers that received these reports. [183]

Mr. W. E. Catlin: These are the primary records.

The Court: They would like to handle it the way they want to, so I guess you will just have to——

The Witness: We could give you the names of just these here, but——

The Court: Well, make it 2:00 o'clock.

Mr. Licht: All right. Thank you.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day, Wednesday, May 15, 1957.) [184]

Wednesday, May 15, 1957, 2:00 P.M.

The Court: Do you want the witness back on the stand?

Mr. W. E. Catlin: Yes.

If your Honor please, at this time, in order to shorten the procedure, counsel for the plaintiff and I have entered into a stipulation regarding the subscription agreements as they relate to the people named in the complaint. The stipulation will be as follows: That of the eight concerns alleged in plaintiff's complaint who have received the reports, that all of these with the exception of Frederick Cooper Studios were subscribers by contract to the Lyon Agency and received their reports at their specific request from the Lyon Agency under the terms of the contract. Is that correct?

Mr. Licht: Yes, your Honor.

The Court: All right.

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, I believe you stated that you used a folder in front of you in preparation of the reports which were issued upon the Carrier or Wishmaker Furniture Company? A. That is correct.

Q. And I believe you stated that in preparing

(Testimony of Byron M. Halfyard.)

these reports you relied on inquiries, on the responses to inquiries to people who sold, suppliers?

A. That is correct.

Q. Your inquiries to banking houses?

A. That is correct.

Q. And other types of documentary information that came to you, into the folder?

A. Correct.

Q. Now Mr. Halfyard, will you examine the complete folder you have and withdraw from it any items within this category that you used in creating the reports in question? Well, let us limit it to yourself for the moment. A. O.K.

Q. You have handed me some credit slips. Would you identify those and tell me what they are, please?

A. These are known as our No. 10 trade information inquiry forms.

Q. Mr. Halfyard, how do you get these forms in your file? Where do they come from?

A. These are sent to suppliers of a concern being investigated and they return them to us by mail, giving the [186] information regarding the account, their experience with it.

Q. These are initiated by you or somebody under your supervision? A. That is correct.

Q. Within the reporting department?

A. That is correct.

Q. And are these initiated promiscuously, or only when you are creating or preparing a credit report on some individual?

(Testimony of Byron M. Halfyard.)

A. When we are preparing a credit report.

Q. And did you or somebody under your direction make these slips and send them out for information on the Carrier or Wishmaker House?

A. Yes.

Mr. W. E. Catlin: If your Honor please, I would like to offer these as Defendant's Exhibit B.

The Court: Yes.

The Clerk: Are they received?

The Court: Yes.

The Clerk: Defendant's Exhibit B in evidence.

(Said documents were marked Defendant's Exhibit B and were received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, do you have any letters from banking houses in your file and which you used to create or prepare these reports? [187]

A. There have been letters. Do you wish me to look through?

Q. Would you, please?

(The witness examines papers.)

A. I have one in front of me.

Q. And may I see it, please, Mr. Halfyard.

Do you find any more?

(The witness hands papers to Mr. W. E. Catlin.)

Mr. W. E. Catlin: Thank you.

The Witness: Here is another one.

Q. (By Mr. W. E. Catlin): Now, I have here three letters on the stationery of First National Bank of Arizona, one being dated December 14,

(Testimony of Byron M. Halfyard.)

1953. Did you use that letter in preparing your report of 1953?

A. I don't seem to have a late report of December, '53, here.

Q. Well, the letter was in the file, wasn't it, Mr. Halfyard? A. Yes.

Q. And isn't it true that you have stated that you used all of the information in the file?

A. That is correct.

Q. Would you also take this letter of 1954 out of the file? A. Right. [188]

Q. And this letter of 1955? A. Right.

Mr. W. E. Catlin: I offer these in evidence as Defendant's Exhibit C.

The Clerk: Defendant's Exhibit C, received?

The Court: Yes.

The Clerk: Defendant's Exhibit C in evidence.

(Said letters were marked Defendant's Exhibit C and were received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, do you have any other letters from any other source in the file, that you used in compiling the information from which these reports were prepared?

A. Yes. There are a number of letters here.

Q. Would you withdraw them from the file, please?

I have here a letter on the stationery of Bumsted & Linsenmeyer directed to Craft Furniture Mfg. Co., dated March 9, 1954. This was in your file and used in the preparation of these reports, Mr. Half-

(Testimony of Byron M. Halfyard.)

yard? A. That is correct.

Mr. W. E. Catlin: I offer this as defendant's exhibit next.

The Clerk: May it be received?

The Court: Yes.

The Clerk: Defendant's Exhibit D in evidence.

(Said two-page letter was marked Defendant's Exhibit D and was received in evidence.)

Mr. W. E. Catlin: If you will bear with me a moment, your Honor, I would like to arrange these according to dates.

The Court: Certainly.

Q. (By Mr. W. E. Catlin): I have here letters from David E. Wilson, from November 7, 1953, through April 20, 1955. These you removed from your file? A. That is correct.

Q. And these are your business records used in the preparation of this report?

A. That is correct.

Mr. W. E. Catlin: Your Honor, I would like to offer these as defendant's exhibit next.

Mr. Licht: Your Honor, before they are received, I would like to take the witness on voir dire to question as to certain of these letters.

The Court: All right, certainly.

Voir Dire Examination

Q. (By Mr. Licht): Now, going through these records that were just handed you, this is an original letter, isn't it, from David Wilson to your firm? A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And that stamp would indicate when you had received it in your office, is that correct? [190]

A. That is correct.

Q. And the same would apply to this letter (indicating document)? A. Yes, sir.

Q. How about this particular one, how could you identify when you received that (indicating letter)?

A. I couldn't identify it, excepting that it was in the folder and is a copy of the letter sent by David E. Wilson.

Q. You have no idea of when it got into the folder, would you?

A. No, I wouldn't know the date.

Q. Now, this one (indicating document) is an original letter to your firm, isn't it? A. Yes.

Q. Is there a stamp on that as to when it was received? A. There doesn't seem to be.

Q. Now, this is one (indicating) that has your "Aug 4 1954" stamp on it? A. That is correct.

Q. And this (indicating document) is "Aug 14 1954"? A. That is correct, yes.

Q. And this (indicating) is "Aug 16 1954"?

A. That is correct.

Q. And as to this one (indicating document), this is a [191] copy of a letter?

A. This is a copy from the collection department we would have received.

Q. Well, this is a copy of a letter addressed to Lyon; this (indicating) isn't an original letter, is it? A. That is correct.

(Testimony of Byron M. Halfyard.)

Q. Do you know how long that has been in the file? A. I haven't any idea.

Q. And this one, do you have any idea when—this is also a copy, isn't it?

A. I don't know when it got into the file, but it is not an original.

Q. It is not the original letter?

A. It is not the original.

Q. And that is true of this one (indicating document), too?

A. That is true of that one, also.

Mr. Licht: Your Honor, I have no objection, to those original letters which were received by their firm in the regular course of business, but those which are not identified I object to their introduction.

The Court: I will overrule the objection.

The Witness: There is one more.

The Court: There is one more, Mr. Licht.

The Witness: That is part of the one that he had, your Honor. [192]

Mr. W. E. Catlin: I will offer these as Defendant's Exhibit E.

The Clerk: Defendant's Exhibit E in evidence.

(Said documents were marked Defendant's Exhibit E and were received in evidence.)

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, I understand that in the reporting department under the items used there is what is called

(Testimony of Byron M. Halfyard.)

by the trade a blue slip? A. Yes, sir.

Q. Do you have any blue slips in your folder?

A. There are some here, yes, sir.

Q. And can you tell me what a blue slip is?

A. Well, a blue slip is a duplicate of a white slip and indicates, gives the same details on the blue slip that were on the white slip, that is, details regarding a claim.

The blue slip differs only from the white slip in that it has the date the claim was collected.

Q. Is it a carbon copy?

A. It is a carbon copy.

Q. Perhaps you can explain, then, what a white slip is.

A. Well, a white slip is a slip similar to this one I have in my hand, only on white paper, with the details [193] regarding a claim, such as the name of the creditor, the debtor, the amount of the claim, the claim number, the date, and then a stamp or a printed part indicating when it was collected, but that would be left blank until the blue slip comes through.

Q. Let me ask you, when you refer to a claim you are referring to a claim placed for collection?

A. That is correct, sir.

Q. Against a business concern?

A. That is correct.

Q. And did you use the blue slips out of the file in preparing your report on Carrier Furniture or Wishmaker House? A. Yes, sir.

Mr. W. E. Catlin: I would like to offer these.

(Testimony of Byron M. Halfyard.)

The Court: They may be received.

The Clerk: Defendant's Exhibit F in evidence.

(Said documents were marked Defendant's Exhibit F and were received in evidence.)

Q. (By Mr. W. E. Catlin): I understand also that you have another item you term "70 item" that is used in compilation of credit reports?

A. That is a claim, it is a claim, Item 70.

Q. That is a claim item; is this the same as a blue slip?

A. It is the same as a white or blue slip. The white [194] slip indicates a claim has been placed.

Q. Is a 70 item originated only by, for example, a local office, or may it be originated by any office of the Lyon Agency?

A. It could originate in any office.

Q. And would you receive an Item 70 if it was originated, for instance, by the New York office?

A. If it pertained to a debtor in our area.

Q. That is what I mean.

A. In the eleven western states, yes, sir.

Q. They would send you a copy of it?

A. That is correct.

Q. Do you have any 70 items in your file?

A. Well, you have taken all the blue ones away. I can tell by looking at them. I did see one from New York there.

Q. Are there any other than——

A. There is an identifying mark indicating which office they come from.

(Testimony of Byron M. Halfyard.)

Q. I see. Are there any other styles than this blue item in here? A. Any white ones?

Q. Yes, any white ones?

A. There are some.

Q. Here is another letter from a bank.

A. Yes. [195]

Q. Well, that is all right. Are these all you find? A. Those are all.

Q. And would you use this, the information contained on these white items 70 sheets in preparing your report?

A. Yes, until such time as the blue ones were available, yes, sir.

Q. In other words, these are preliminary before a blue slip? A. That is correct.

Q. And did you take these out of your file that you used in preparation of the Carrier report?

A. Yes, sir.

Mr. W. E. Catlin: I offer this as defendant's exhibit next.

The Clerk: Received?

The Court: Yes.

The Clerk: Defendant's Exhibit G in evidence.

(Said documents were marked Defendant's Exhibit G and were received in evidence.)

Q. (By Mr. W. E. Catlin): I noticed, Mr. Halfyard, that you overlooked a letter of the Valley National Bank, at the time you handed me the others. Is this a letter received in response to an inquiry for information by your department?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And this letter was in the file that you used in the preparation of the report? [196]

A. That is correct.

Mr. W. E. Catlin: I would like to offer it as a separate exhibit, your Honor.

The Court: All right, as a separate one.

The Clerk: Defendant's Exhibit H in evidence.

The Court: H.

(Said document was marked Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, let us turn to the March, 1954 report.

A. March 23rd?

Q. Yes. A. Yes, sir.

Q. And compare it with the previous 1953 report.

Mr. Licht: There was a March 9th report, too.

Q. (By Mr. W. E. Catlin): Both of the March reports, 1954, and the December, 1953, report.

A. Well, here is the December, 1953 report.

Q. Yes, and you have the two later reports?

A. Here is March, 1954. These reports are not in order.

Q. Do you have those, now? A. Yes.

Q. Now, in this report I would like you to tell me whether or not the later reports, that is the March reports [197] of 1954 reflect that the conditions of the subject's business had improved?

A. It mentions in the "General Information" paragraph about moving to new quarters in a more favorable area for a business of that type?

(Testimony of Byron M. Halfyard.)

Mr. Licht: Which report are you referring to, now, Mr. Halfyard?

The Witness: March 23, 1954.

Q. (By Mr. W. E. Catlin): Have you looked at the entire report?

A. (Witness examines document.) Is that the report you had in mind?

Q. Yes. A. March 23rd?

Q. That is correct. I am speaking of the entire report generally, Mr. Halfyard, and comparing this report with the prior one, is it not true that this report reflects that there has been some improvement in debtor's financial condition and business condition?

A. There are no claims in the later report.

Q. All right. Now, let us compare this 1954 report with the April, 1955 report.

A. I don't seem to have the April, 1955 report.

Mr. W. E. Catlin: Do you have it, Mr. Licht?

The Witness: There were some reports—— [198]

Mr. W. E. Catlin: Do you have the original reports here? Yes, they do. Here is March, 1955.

The Witness: Some of these were exhibits yesterday.

Mr. Licht: Yes, they are in evidence, Mr. Halfyard.

Mr. W. E. Catlin: ——of April 18, 1955. Here it is.

(Mr. Catlin hands document to the witness.)

The Witness: Thank you.

Q. (By Mr. W. E. Catlin): Now, just take a

(Testimony of Byron M. Halfyard.)

moment and check through this report and tell me whether or not this reflects an improvement in the business and standing of the plaintiff Wishmaker House?

A. Yes, I would say it does show an improvement.

Q. Then what in particular reflects this improvement?

A. A statement which indicates a reduction in accounts payable. Do you want me to be specific?

Q. Yes.

A. ———of \$49,000 to \$9,700 and settled with creditors for \$3,000. That is a note appearing on the statement. That is from Mrs. Carrier, or her accountant.

Q. Then, in each case, Mr. Halfyard, the subsequent report has reflected the actual improving condition of the plaintiff, is that not correct?

A. That is correct, sir.

Q. Calling your attention to page 2 of the report, Mr. Halfyard, the one of April 18, 1955, would you refer to [199] the very final sentence in the last paragraph headed "Analysis."

A. Yes, sir.

Q. What does this sentence say?

A. "Her affairs have shown considerable improvement."

Q. Now Mr. Halfyard, in your direct testimony you referred to certain standard procedures for determining credit ratings and the meaning of symbols that were used. Now, I have here a little card

(Testimony of Byron M. Halfyard.)

which shows a great number of symbols on both sides. Would you examine it and tell me if these are the standard symbols and their meanings that are used in Lyon credit reports?

A. That is correct, sir, yes.

Q. Now, I note here, Mr. Halfyard, that on one side it shows "12, 13, 21," etc., and that these state, "12 — Business Recently Commenced," "13 — Inquire for Report," "21—Buys small, usually pays cash."

What in particular does the 12, 13 or 21, or whatever it is, refer to in the grading of the report?

A. You mentioned several there. They each refer to a different—12 means new business. 13 means inquire for report.

Q. In other words, each one of these symbols has a definite meaning attributed to it?

A. That is correct, yes, sir. [200]

Q. And this meaning is set forth on this card?

A. That is correct.

Q. I notice on the back side it has "Capital Ratings" and these are A, B, C, and D, etc. These refer to what?

A. To the capital structure, the net worth, the ratable net worth of the business.

Q. I see. And I notice over here on this side you have "Pay Ratings."

A. They refer to the manner in which bills are usually paid as determined by the supplier's report.

Q. Now Mr. Halfyard, I could take any combination off the front of this and combine it with

(Testimony of Byron M. Halfyard.)

any combination on the back of this card, without any symbol being directly related to the other, could I not? For example, I could pick 81 on this side, that says "Chattel mortgage" and put it with "2" which means prompt payment and show that they have an "A" rating, couldn't I? A. Yes.

Mr. W. E. Catlin: I would like to offer this as defendant's exhibit next, your Honor.

The Court: All right, it will be received.

The Clerk: Defendant's Exhibit I in evidence.

(Said card was marked Defendant's Exhibit I and was received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, in your direct examination you stated that you couldn't find in the [201] file where information on the 50 per cent offer to creditors was contained. I have Exhibit E here. I noticed in here is a letter from David E. Wilson to the creditors of Carrier's Furniture Company. Does that letter contain any reference to a 50 per cent offer of settlement?

Mr. Licht: Your Honor, before he answers it, I would like to renew my objection. This is one of the particular letters that he testified to on my voir dire, that he didn't know when it got into the file and had no recollection of anything with respect to it. It is not a letter addressed to him, and I respectfully submit that it is not proper for him to testify with regard to it.

The Court: I will overrule the objection, Mr.

(Testimony of Byron M. Halfyard.)

Licht. I overrule the objection. You may answer.
You may answer.

The Witness: I don't remember the question. This information is contained in the report and it's just about exactly the information that the letter contains, so I believe that I obtained this information from this letter. It is a letter from Mr. Wilson to the creditors, a copy of which I presumably had; otherwise I wouldn't have had the information for the report.

Q. (By Mr. W. E. Catlin): And this letter came out of your report folder?

A. Yes, I see. I couldn't find it this morning when I—— [202]

Q. And it does contain information regarding an offer of 50 per cent settlement?

A. Right, that is correct.

Q. Thank you. Mr. Halfyard, have you ever prior to today met Mrs. Carrier personally?

A. Yes, I did.

Q. And do you recall when and under what circumstances this meeting took place?

A. I don't remember the date, excepting that I would place it in April, 1955.

Q. Do you recall how the meeting came about?

A. Yes. Mr. Abernathy came in my office and said, "Mrs. Carrier from Phoenix is here. Would you get out your credit file and come over to my office," which I did.

Q. Would you identify Mr. Abernathy as he sits in the courtroom, please.

(Testimony of Byron M. Halfyard.)

A. Yes. I identify him. He is sitting down there to your right.

Mr. W. E. Catlin: Will you stand up, please (addressing Mr. Abernathy).

The Witness: That is Mr. Abernathy.

Q. (By Mr. W. E. Catlin): That is Mr. Abernathy? A. Definitely.

Q. And at that time was he an official or in the employ of the Lyon Agency? [203]

A. He was credit manager for the Lyon Agency —collection manager. I beg your pardon.

Q. Collection manager? A. Correct.

Q. Now go ahead.

A. I went in to Mr. Abernathy's office and he introduced me to Mrs. Carrier and Mrs. Carrier and he continued their conversation, and I was only there a few minutes, but at one point there seemed to be a break and I asked Mrs. Carrier if she would care to go over her credit report and she said that she didn't care to, that she knew she was slow. And I asked her if she employed a manager and she said, "No." And about that time I had a long distance telephone call and I left, and that is the only time I have met Mrs. Carrier.

Q. And this was your complete interview?

A. That, as I remember it, was my complete interview.

Q. Now, as a result of this meeting, did you correct or change in any manner any parts of the reports that had previously been issued on her to that time?

(Testimony of Byron M. Halfyard.)

A. I believe after that time, several days or the same day later, I changed the report and deleted the sentence, that she didn't employ a manager.

Q. And did you have any reason for deleting this?

A. Nothing except Mrs. Carrier's word, which I accepted. [204]

Q. In other words, she asked you to delete it and you did?

A. No. She didn't ask me to delete it. She answered my question by saying she didn't have a manager and I deleted it voluntarily.

Q. Now, you, then, did not know Mrs. Carrier personally at the time you wrote the 1953 and the 1954 reports in question? A. No, I did not.

Q. And the April report of 1955?

A. The first report, no, I did not.

Q. In other words, you met her between the time of the first April, 1955 report and the corrected—— A. That is correct.

Q. Now Mr. Halfyard, did you have any personal animosity toward Mrs. Carrier?

A. Of course not. Not the least. I didn't know the lady any more than by name.

Q. Did you have any knowledge of her except through the information contained in your folder?

A. No, none whatsoever.

Q. Mr. Halfyard, at the time you wrote the 1953, '54 and '55 reports, did you believe all the information you put into the reports that you created to be true? A. I did. [205]

(Testimony of Byron M. Halfyard.)

Mr. W. E. Catlin: I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Licht): Now, going for a minute to the question of the files, Mr. Halfyard, you testified I believe that you have a report file, or some such wording, is that right, a file in which you keep the information covering your report?

A. Yes, sir.

Q. Isn't it true that your organization also has collection files? A. Yes, sir.

Q. And do you have those collection files with you? A. No.

Q. Well, have you examined those collection files in connection with this lawsuit?

A. Not any more than the letters that have been, copies given to me, or the original letters that became part of this folder here.

Q. Now, for instance, this letter from Bumsted & Linsenmeyer, Defendant's Exhibit D, to Craft Furniture which we discussed, that would have been a part of the collection file rather than your report file, wouldn't it?

A. I had seen this letter.

Q. I realize you had, but wasn't it part of the report file? [206] A. Yes, sir.

Q. Or was it part of the collection file?

A. Part of the collection file, I would presume. My writing is on it and I know I had seen it.

Q. Which is your writing on there, please? What does it say there?

(Testimony of Byron M. Halfyard.)

A. "Please get me report. See Paul. 5 payments, Dec. 2 to Feb. 23, Total," so and so.

Q. Now, this red writing that is on there, that is not yours, is it?

A. That is not mine, no.

Q. And these blue slips, Defendant's Exhibit F, they would be part of the collection file, too, wouldn't they?

A. That would be part of the credit file. Those come to the credit department, the white slip first and then the blue slip when it is paid.

Q. Now, when you get the white slip, that means that a matter has been turned over to your organization for collection, is that right?

A. Yes, sir.

Q. And your organization apparently deemed it important enough to notify the credit department, your department, that matters had been turned over for collection, is that right?

A. Yes, sir. [207]

Q. And that is an important part of a report, isn't it?

A. That is correct.

Q. And therefore, in making reports following that, you would be interested, would you not, to know when they were collected, if they were?

A. That is correct.

Q. Now, your December 29, 1953 report, which is Plaintiff's Exhibit 8, says that several items had been placed for collection against Frank Carrier; do you recall that, during 1953?

A. Yes.

Q. Now, between December, 1953, when this

(Testimony of Byron M. Halfyard.)

report was made, and March 9, 1954, could you tell from these blue slips, Defendant's Exhibit F, whether or not there were any collections completed? In other words, from December through March, December '53 to March '54?

A. There don't seem to be. There is one here that I am in doubt about because the date is smeared and I can't tell, but the other ones were not collected between December, 1953 and March, '54.

Mr. W. E. Catlin: No.

The Witness: Wait. No. No. I would say no.

Q. (By Mr. Licht): All right. Now, will you please tell me why in your two reports of March, 1954 you mention nothing about these collection matters? [208]

A. They referred to Frank Carrier.

Q. So it is your testimony, is it, that these collections we are talking about refer to Frank Carrier and not to Irene Carrier?

A. The ones mentioned in the first part of that report you showed me referred to Frank Carrier. His name was mentioned.

Q. Well then, is it your testimony that as of March, 1954, your reports indicate that there were no matters of collection mentioned against Mrs. Carrier?

A. I would have to look at that again.

There are no claims listed in the March 9, 1954 report against Irene N. Carrier.

(Testimony of Byron M. Halfyard.)

Q. Or in the March 23rd, I believe, is that correct? A. That is correct.

Q. And would it be your conclusion from that, then, that so far as your department knew, there were no claims for collection against her at that time?

A. I would say if there were any claims available to me at that time, they would have been in the report.

Q. Now, I am going to show you the April 18, 1955 report and refer you to where it says, "During 1953, eight items of collection were placed with Agency." Now, what do those refer to?

A. Well, they refer to eight claims placed with the Agency [209] during 1953. It states that there.

Q. That would indicate that there were claims against Irene Carrier placed with the Agency, isn't that correct?

A. They may be against Carrier Furniture Company.

It is hard to separate the claim. The bill was paid by one person and contracted maybe by another person. In other words, it is an old bill that Mrs. Carrier had since paid. I wouldn't be able to differentiate there.

Q. All right now, these blue slips, then, indicate to you that the bills were paid, isn't that right?

A. That is correct.

Q. Now, in examining these, it appears to me that the last date stamped under the word "Collected" is January 7, 1955, on the top one. Now,

(Testimony of Byron M. Halfyard.)

would you look at that and see if that is the latest date on any of them showing those were collected?

A. There is one here that looks like February 16th, 1955. I don't know if it is "'54" or "'55."

Q. All right. Taking that February date, would that be the latest date that any of those were collected? A. That is correct.

Q. And the others would indicate that they were collected a few months just prior to that, in the fall of 1954? A. September of '54.

Q. Wouldn't they? [210]

A. In September, 1954, yes.

Q. So when you prepared this report of April 18, 1955, that would be the first report that you prepared after these items had been collected, isn't that correct, all of them? A. Yes.

Q. Now, would you please tell the Court why it is that you didn't state here when you stated that the items had been placed for collection, that they had been paid?

A. Your Honor, we never state after two years whether a collection item has been paid or not. It is presumed it is paid and it is of little importance as the business is going on, it is still active.

On claims up to two years we give the date of claim, definite information regarding it, and whether it is paid or unpaid.

After two years, we just say in 1953 or 1951 so many items were placed with the Agency for collection. That just gives the credit manager an idea

(Testimony of Byron M. Halfyard.)

of the method of payment, they are presumed to be paid, then. We do not give the impression that that were not paid at all, that they were just slow at that time.

Q. During 1954, what information did your reports contain with respect to these items for collection?

A. Well, there is no mention in the March 9, 1954 of any collections. [211]

Q. And the same for the other March?

A. The same for the March 23rd report.

Q. Now, this letter from Mr. Wilson addressed to your firm, of August 19th, which refers to certain of these 50 per cent offers, begins, "Replying to your letter of August 16"; do you have a copy of that letter of August 16th?

A. I said I didn't have one this morning, sir, but I think there was one found since. That was a letter dated when?

Q. August 16, 1954 from your firm to Mr. Wilson.

A. From our firm to Mr. Wilson——

Q. The letter begins, "Replying to your letter of August 16," and it is dated August 19th.

A. I don't seem to have any letter here, any copy of that.

Q. Is there some other information or other files in your office in respect to this matter that are not in court, Mr. Halfyard?

A. If there are, sir, I don't know anything about them.

(Testimony of Byron M. Halfyard.)

Q. Referring to this letter from Mr. Linsenmeyer, which is Defendant's Exhibit D, I believe you stated on your examination by your attorney, that it was from this letter that you had gleaned the information with respect to the moratorium, is that correct? [212]

A. That is I believe correct, yes, sir.

Q. And that is contained in this paragraph, where it says, "At this time we are requesting for our client a moratorium," is that right?

A. That is correct.

Q. Now, did you not deem it important in reporting on that request for a moratorium to also report the other information contained in that letter which showed the past record of Mrs. Carrier for payment under the agreement?

A. I think the information brought out in this report of March indicated that there was an extension in effect and that payments had been made but a moratorium had been requested. That was the important up to date information at the time the report was written, that a moratorium was requested, then.

Q. All right now, getting on to those cards which you talked about before, which showed that there were some two or three dozen requests for reports, is that correct? A. Yes.

Q. Now, how come some of them have a line through them. What does that mean?

A. That means that, at the time—I presume that it means that when we get one of those 10

(Testimony of Byron M. Halfyard.)

forms back from a supplier and it states, "We haven't sold the account for a year," we cross it off the folder, so we don't send them the [213] same form again; in other words, waste six cents postage to send it to a man who isn't selling.

Q. Do the numbers on there indicate you sent 10 forms to these people or that you sent credit reports to them?

A. Both, both. We use this as a supplier—in most instances the person who asks for a report is also a supplier of the concern.

Q. So when they send for a report, you also send them a 10 form, is that correct?

A. That is correct.

Q. All right. Will you please identify for me the names of the firms that sent for reports during 1953, '54 and '55?

A. Well, '53, '54 and '55. The numbers are here and they mean nothing to me at all.

Q. Well, to whom do they mean something?

A. To a file. We have a cross-file indicating.

Q. Do you have a file in your office which refers each manufacturer to a particular number?

A. To our Los Angeles office, a subscriber to our Los Angeles office only.

Q. And those which are not in the Los Angeles office which are listed here, you couldn't identify them?

A. I couldn't identify them.

Q. Do you know where that information is?

(Testimony of Byron M. Halfyard.)

A. In the individual offices.

Q. So, in order for us to determine each person who received one of these reports, we would have to contact each of those individual offices, is that right?

A. Well, I think that would be a question for our general manager. I don't know if he has the information available in the executive office.

Q. And how many offices does the firm have that you know of? A. Eight offices.

Q. And how many of these eight offices receive copies of these reports on Mrs. Carrier?

A. Any office asking for one. Automatically there are so many offices and——

Q. Well, don't these reports show a distribution where you send them just to various offices?

A. Yes, that is correct.

Q. Like C-H-O-N refers to a report sent?

A. Well, those would be the offices that would get them as a matter of routine, and the other offices would get them by request.

Q. So you send them to four different offices in the beginning, is that right, so they would have one in their local files, is that correct?

A. That is correct. [215]

Q. And from your record, you have no way of telling who the persons are who got reports, then, from those offices, have you?

A. Yes, we would. They would appear on this folder here.

(Testimony of Byron M. Halfyard.)

Q. I mean you can't identify them? The numbers are there.

A. I can't identify them by name. By number only.

Q. Now, you stated to your attorney a few minutes ago, when he asked what information you used in preparing it, you used the phrase, and I wrote it down, "I used all the information in the file," is that correct?

A. Well, if I say I use all the information in the file, it means I looked over all the information in the file and used what I think is pertinent.

Q. And would that mean that you also looked over all the information in the credit file in your office?

A. I am talking about the credit file.

Q. I mean in the collection file.

A. The collection file I wouldn't touch at all. The collection department sends me copies of information that is pertinent to the credit report.

The Court: Is that all, Mr. Licht?

Mr. Licht: Yes. That is all.

The Court: You may step down. [216]

The Witness: Thank you, sir.

The Court: That is all. We will take the afternoon recess.

(Recess.)

The Court: Just come to order.

Mr. Licht: Mr. Davis, please.

The Court: Go right ahead.

NORMAN B. DAVIS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Norman B. Davis.

Direct Examination

Q. (By Mr. Licht): What is your occupation?

A. Manufacturers' representative.

The Court: Manufacturers' representative.

Q. (By Mr. Licht): You are a manufacturers' representative? A. Yes.

Q. In the furniture field? A. Yes, sir.

Q. How long have you been engaged in that occupation? A. Ten years.

Q. And during that course of that time, has one of [217] your accounts been Irene Carrier in Phoenix? A. That is right.

Q. How long have you been calling on her as an account, do you remember?

A. Oh, seven years; seven to eight years.

Q. Now, are you familiar with Lyon Furniture Mercantile Agency? A. I am.

Q. And do you use this Red Book which I have here, in connection with your job?

A. Yes, sir.

Q. That is supplied to you by some of your companies you represent? A. That is right.

Q. And when you are going to call on an account for the first time, say, do you look at Lyon's for their rating before you call on them?

(Testimony of Norman B. Davis.)

A. Normally, yes.

Q. And if you looked in Lyon's and saw a rating of 13-6, would you call on that account?

Mr. Lindenbaum: If the Court please, I object to that question. What this witness would do in connection with a given account is not the test.

The Court: I will overrule the objection.

Mr. Lindenbaum: I respectfully except. [218]

The Court: You may answer.

The Witness: No, I wouldn't call on a 13-6.

Q. (By Mr. Licht): And if the rating was simply a 13, what would you do?

Mr. Lindenbaum: One minute. Again I make the objection.

The Court: Yes. I will overrule the objection.

The Witness: If it were 13, it would bear investigation by either inquiring for a report or taking an order and letting the credit manager of the firm inquire for a report.

Q. (By Mr. Licht): What would you do if the rating were 13-P-2?

A. I have never come across that rating.

Mr. Lindenbaum: May I again make the same objection.

The Court: The same objection. I will overrule the objection. He said he had never seen it.

The Witness: I have never seen a 13-P-2. It would either be a P-2 or a 13-2. There possibly is that rating in Lyon's. I have never run across it. A P-2 would indicate that you could sell it.

Q. (By Mr. Licht): You could sell to a P-2?

(Testimony of Norman B. Davis.)

A. A substantial amount.

Mr. Licht: I have no further questions.

Cross Examination

Q. (By Mr. Lindenbaum): Mr. Davis, do you extend credit yourself? [219] A. No, sir.

Q. Are you a credit man? A. No, sir.

Q. And from whom do you get that book that you mentioned, that you get, a Lyon's Agency book?

A. Those are furnished by the factories in many cases.

Q. Which factories?

A. I represent five firms, and any one of the firms will give you the supplement that pertains to your territory.

Q. Will you mention specifically from whom you get a Lyon's book?

A. American Furniture Novelty Company, Chicago.

Q. And the credit of any given account is passed upon by the credit manager of the American?

A. That is true.

Q. And not by you? A. That is right.

Mr. Lindenbaum: That is all.

Mr. Licht: I have nothing further. May the witness be excused, your Honor?

The Court: The witness may be excused.

Mr. Licht: Mr. Frankel, please. [220]

BENNETT FRANKEL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Bennett Frankel.

Direct Examination

Q. (By Mr. Licht): And what is your occupation, Mr. Frankel?

A. Manufacturer's representative.

Q. What manufacturer do you represent?

A. T. Baumritter Company.

Q. They are a furniture manufacturer?

A. Furniture manufacturers, yes.

Q. What areas do you represent?

A. Southern California and Arizona.

Q. How long have you held that position?

A. A little over ten years.

Q. And in the course of that business, have you had occasion to meet Irene Carrier? A. Yes.

Q. And how long have you known her?

A. I have called on the account about eight years.

Q. And have you taken orders from Irene Carrier during most of that eight year period?

Mr. Lindenbaum: One minute. I object to that question [221] as leading and being incompetent.

The Court: I overrule the objection.

Mr. Lindenbaum: I respectfully except.

The Court: You may answer.

The Witness: Yes.

(Testimony of Bennett Frankel.)

Q. (By Mr. Licht): Now, do you get supplied by your employer with a copy of the Lyon Red Book?

A. Yes, to that section only of the territory that I cover.

Q. And this which I show you is the whole United States?

A. That is the whole United States. I get just that segment that applies to the territory that I cover.

Q. And before you call on an account, say that it is a new account, you look at Lyon's to see what the rating is?

A. Well, that is the purpose we use it for, to determine whom we call on.

Q. And if you looked in Lyon's and found a rating of 13-6 on an account that you had never called on before, would you call on that account?

Mr. Lindenbaum: I object to that question as incompetent.

The Court: I will overrule the objection. You may answer.

The Witness: No. I would not call on an account with that rating. [222]

Q. (By Mr. Licht): And if an account had simply a 13 rating, what would you do with respect to it, if it was the first time and you had never called on them before?

Mr. Lindenbaum: I respectfully object.

The Court: Yes. I will overrule the objection.

Mr. Lindenbaum: I respectfully except.

(Testimony of Bennett Frankel.)

The Witness: In a case where an account is 13, which means "Inquire for Report," I would make my own investigation and probably talk to some of the other salesmen and see if they had been selling the account, and if I felt that just the general information that I got from the other fellows was sufficient, I would call on the account knowing that they had a rating of just 13.

Mr. Licht: I have no further questions.

May I ask just one more question, please?

Q. What about an account which you had never called on before and it had a rating of 13-P-2, what would you do with respect to it?

Mr. Lindenbaum: I make the same objection.

The Court: I will overrule the objection.

The Witness: Well, I would call on a—I have never seen the rating to my knowledge, but I would probably call on it, because a P-2 indicates prompt pay with limited financial responsibility, despite the 13, "Inquire for Report." [223]

Mr. Licht: All right.

Cross Examination

Q. (By Mr. Lindenbaum): You are a salesman, is that correct, sir? A. Right.

Q. And you do not extend credit?

A. I do not extend credit, no.

Q. T. Baumritter Company has a credit manager? A. Yes.

Q. And they look into the credit——

A. Yes.

(Testimony of Bennett Frankel.)

Q. —and pass on the credit? A. Correct.

Q. If you knew that a concern had an extension for the benefit of creditors, would you call on that firm? A. No.

Q. As a matter of fact, Baumritter does sell this plaintiff, doesn't it? A. Yes.

Q. And to what extent, how much, in dollars and cents?

A. The credit department limits the financial responsibility of the people we do business with. We have sold them consistently.

Q. Yes. In this particular case, how much credit does Irene Carrier get from T. Baumritter? [224]

A. That is determined by the credit department.

Q. I am asking you, whether you know?

A. I don't know the exact amount.

Q. As a matter of fact, it is over a thousand dollars, isn't it? A. Yes, it is.

Q. And you do call on Irene Carrier?

A. I do.

Q. And you did call on Irene Carrier despite the 13-6 rating, didn't you? A. Yes.

Mr. Lindenbaum: That is all.

Redirect Examination

Q. (By Mr. Licht): Could you tell the Court why it was that you called on her?

Mr. Lindenbaum: I object to his asking this witness that question.

Mr. Licht: He asked him whether he called on

(Testimony of Bennett Frankel.)

her despite the rating. I would like to have him explain it.

The Court: I will sustain the objection.

Mr. Licht: I have nothing further. May he be excused, your Honor?

The Court: He may be excused.

The Witness: Thank you.

Mr. Licht: I would like to call Mr. Sigerson, [225] your Honor, as an adverse witness.

The Court: Mr. Sigerson.

JOHN J. SIGERSON

called as a witness herein by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: John J. Sigerson.

Direct Examination

Q. (By Mr. Licht): What is your occupation, Mr. Sigerson?

A. General manager of the Lyon Furniture Mercantile Agency.

Q. And your office is in New York, is that correct?

A. The executive office is in New York.

Q. And are you also a partner in this firm?

A. I am.

Q. Now, do you have in your possession any records or part of the file pertaining to Mrs. Carrier, other than has been exhibited in court?

(Testimony of John J. Sigerson.)

A. No.

Q. Are there any records in your New York office that you know of that pertain to that?

A. Correspondence in connection with the case, yes, as it developed.

Q. I am talking about prior to the filing of the lawsuit, that is any of the correspondence or documents that made up part of the file prior to the filing of the lawsuit?

A. Only those that I am telling you about, correspondence pertaining to the suit after it was filed, as well as credit reports in the New York office.

Q. Well, you don't have, then, in your possession, for instance, the letter which I asked Mr. Halfyard about, of April 16th, I believe, 1954 from this office to Mr. Wilson in Phoenix?

A. Do I have any correspondence?

Q. Yes? You don't have that letter, do you?

A. No.

Q. Have you ever seen the letter, so far as you know?

A. Oh, very likely I have seen it if it was in the possession of our counsel.

Q. What I have in mind is this: The letter to Lyon's in Los Angeles is signed by Mr. Wilson and it is dated August 19, 1954, and it says, "Replying to your letter of August 16." Have you seen that letter of August 16th?

A. Not to my knowledge.

Q. Have you examined the files here in Los Angeles, both the credit file and the collection file?

(Testimony of John J. Sigerson.)

A. Not the collection files, not the credit files.

Q. What files have you examined?

A. Just the books and records of the office.

Q. Now, as a partner in this firm, Mr. Sigerson, can you give the court an estimate of the net worth of the partnership of the Lyon's Furniture Mercantile Agency?

Mr. Lindenbaum: I object, if the court please, as being incompetent and irrelevant.

Mr. Licht: One of the issues, your Honor, is punitive damages and I think the cases hold that one of the elements that may be proven in order to determine punitive damages is the value or net worth of the defendant.

The Court: I will sustain the objection.

Mr. Licht: I have nothing further, your Honor.

The Court: Any examination?

Cross Examination

Q. (By Mr. W. E. Catlin): Mr. Sigerson, I believe you stated you are the general manager of the Lyon Agency?

A. That is correct.

Q. Do you know when the Lyon Agency was organized?

A. Yes, it was founded in 1876.

Q. How many offices does it have in your organization?

A. Presently from coast to coast, eight offices.

Q. What is the type of business carried on by the Lyon Furniture Mercantile Agency?

A. The Lyon Furniture Mercantile Agency is a credit reporting agency supplying the mercantile

(Testimony of John J. Sigerson.)

agency service to [228] the credit managers of manufacturers, wholesalers and jobbers in what might be termed the home furnishing industry.

Q. Mr. Sigerson, we have here that has been exhibited several times a credit reference book of the Lyon Furniture Mercantile Agency. Is this a publication by the Agency?

A. That is published semi-annually by the Agency and has been since 1876.

Q. Do you have any idea how many firms are listed in this publication?

A. Roughly over 130,000.

Q. Do you have any idea how many reports are issued by the organization per year?

A. I would say over a hundred thousand.

Q. To whom are reports issued by the Lyon Furniture Mercantile Agency?

A. Only to subscribers under contract who have written in requesting the reports.

Q. In other words, Mr. Sigerson, before a person can obtain the services of the reporting section of the Lyon Agency, they must enter into a contract with you? A. Into a written contract.

Q. And this contract defines the rights and the circumstances under which a report will be granted, is that correct? A. That is correct.

Q. Now Mr. Sigerson, is it true that these reports are [229] only issued at specific request of a subscriber? A. That is correct.

Q. Mr. Sigerson, are you personally acquainted with Mrs. Irene Carrier? A. Yes.

(Testimony of John J. Sigerson.)

Q. Would you tell the court when you became acquainted with her?

A. I met her at her place of business on Memorial Day, May 30, 1955—'56, please.

Q. Would you tell the court, please, how this meeting came about?

A. Yes. One day very early in the year, T. Baumritter, Theodore Baumritter of T. Baumritter & Company, Incorporated, called on me and said he was visiting me at the request of Mrs. Carrier and he knew of the lawsuit. And I asked him what he wanted me to do. He thought we could—he could intervene in some way, and I asked him in what way that he could.

Well, he said, "Why don't you call her up when you get to Los Angeles?"

I visited Los Angeles or the Los Angeles office on the Monday prior to Memorial Day, which I believe was on Wednesday of that week and I telephoned, and she invited me out to see her in Phoenix, and we fixed a date for that Wednesday which was a holiday, May 30, 1956. [230]

Q. This was the only time in your life prior to this trial that you met her?

A. The only time I ever met Mrs. Carrier.

Q. Now, had her name ever come to your attention as an individual prior to the filing of this action?

A. I never heard of Mrs. Carrier prior to that.

Q. Did you have any ill will or malice toward her personally?

A. None whatever.

(Testimony of John J. Sigerson.)

Q. Mr. Sigerson, I would like very much if you would give me the names of the members of the partnership which comprise the Lyon Furniture Mercantile Agency.

A. Yes. There is Mrs. Adalaide J. Lyon. There is John L. Graham, there is Frank A. Gaffney, J. L. Eshelman, also known as Fred Eshelman, Margaret R. Lyon, Clare C. Nevers, and myself, John J. Sigerson.

Mr. W. E. Catlin: That is all, your Honor.

Mr. Licht: That is all.

The Court: You may step down.

The Witness: Thank you.

Mr. Licht: Your Honor, may I have permission to recall the plaintiff?

The Court: Certainly.

Mr. Licht: Mrs. Carrier. [231]

IRENE M. CARRIER

the plaintiff herein, recalled as a witness on her own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Licht): Now Mrs. Carrier, you recall that yesterday I had asked you some questions with respect to the damage which you alleged in your claim. Do you have at this time any way of more specifically fixing the damages than at that time; have you made any calculations?

A. Yes. May I have my purse, please? Thank you.

(Testimony of Irene M. Carrier.)

(The witness removes paper from envelope.)

I made a list here of moneys thrown into that business.

Mr. Catlin: I can't hear you.

Mr. Licht: Would you speak louder, please.

A. I made a list of approximate moneys put into that business in order to keep it open. It was done by refinancing and mortgage on the building, most of it.

Q. And how much additional capital did you put in because of that?

Mr. Lindenbaum: Now, your Honor, I object to the question as being purely hearsay, as not being the best evidence and not binding on this defendant.

The Court: I will overrule the objection. You may [232] answer.

The Witness: I put a total of \$20,100. Some of that was for own personal furniture that I sold, as we were liquidating the business, as I came out of the new house, and it was \$1,675, it was new merchandise. It had been in the new home about three months. I merely threw it back into the business and sold it and threw the funds right into the business. The rest of it was by refinancing a mortgage.

Q. (By Mr. Licht): You did that on more than one occasion? A. Three different times.

Mr. Licht: I have nothing further, your Honor.

Mr. Lindenbaum: No questions.

Mr. Licht: Your Honor, at this time I would like to amend the complaint in paragraph III particularly, to include allegations with respect to re-

ports made by the defendant on March 9, 1954, which is Plaintiff's Exhibit 10, on April 18, 1955, which is Plaintiff's Exhibit 15, and on December 29, 1953, which is Plaintiff's Exhibit 8.

The Court: All right.

Mr. Lindenbaum: If the court please, I object at this time to the plaintiff's motion on the ground that this case has been now pending for approximately two years; that the plaintiff had ample time to amend its pleadings during that two year period of time; that the plaintiff conducted an [233] examination before trial of the defendant and had this information available to it about four months ago; that we came to this court based on the complaint, a written, signed complaint, by Mr. Licht, and prepared to defend that complaint, and I respectfully submit that the plaintiff is guilty of laches and that that motion should be denied.

The Court: Well, I will overrule the objection and let the amendment be made. It is brief, so I just let it be made orally.

Mr. Licht: Thank you.

The plaintiff rests.

The Court: As to those three dates, March 9th, April 18th and December 29th.

Mr. Licht: April 18, 1955 and December 29, 1953.

The Court: All right. Well, we have the dates.

Mr. Licht: Thank you.

The Court: We don't need a written amendment for that.

Mr. Licht: All right. The plaintiff rests.

(Whereupon the plaintiff rested her case in chief.)

Mr. W. E. Catlin: If your Honor please, I believe we only have ten minutes left today, is that correct?

The Court: Yes, sir.

Mr. W. E. Catlin: Of our normal day. And I have a motion that I would like to present to the court at the beginning of our case and it will take me quite a bit longer [234] than ten minutes to present my part of this motion. I am wondering if I might have leave to do this tomorrow morning?

The Court: Well, shall we start at a quarter to 10:00, something like that?

Mr. W. E. Catlin: Yes. I will be glad to.

The Court: That will give you ample time?

Mr. W. E. Catlin: Yes.

The Court: We will adjourn at this time and make it 9:45.

Mr. W. E. Catlin: Thank you.

The Court: All right, 9:45.

(Whereupon an adjournment was taken at 3:50 p.m. on Wednesday, May 15, 1957 until the following day, Thursday, May 16, 1957 at 9:45 a.m.) [235]

Thursday, May 16, 1957, 9:45 a.m.

The Court: Now I will hear from you on the argument.

Mr. W. E. Catlin: At this time, your Honor, the defendant moves that the plaintiff's complaint be dismissed, on the following grounds; and that we

have judgment for the defendant at this time on the pleadings and the evidence, upon the following grounds:

That the plaintiff's complaint and the evidence given before this court are not sufficient to sustain a claim for which relief can be granted, for the following reasons:

In order to sustain an action for defamation, plaintiff must allege and prove that defamatory matter was published and that as a result of such publication damages proximately flowed from same.

In the event the publication is not libelous per se, plaintiff must allege and prove by use of innuendo that the words were understood in a libelous sense and that as a result, specific damages proximately flowed from said publication.

In this particular case, your Honor, the plaintiff has alleged that the defendant published that she obtained the business as a result of marital difficulties and that by innuendo this is a libelous statement.

Also, plaintiff alleges that the defendant stated that [238] she did not have a manager, that she was on C.O.D. basis when in fact she had a good credit rating, and that as a result of these statements and publication she was damaged. However, they do not allege specifically how she was damaged—merely a general allegation of blank money.

(A short interruption.)

The Court: Go right ahead.

Mr. W. E. Catlin: Thank you.

Now, in the evidence given before this court plaintiff concedes that of the eight parties named in her complaint only seven of them were subscribers or received information from the Lyon Furniture Mercantile Agency, and by stipulation they have agreed that each of these seven parties received this information as subscribers under a written contract and by specifically requesting the information from the Lyon Furniture Mercantile Agency.

Now, Section 45A of the California Civil Code provides, and I am not quoting, your Honor, that a libel which is defamatory of the plaintiff without the necessity of explanation or innuendo is said to be a libel upon its face, but if it is not libelous upon its face, if it is not bad, that they must plead and prove special damages as a proximate result thereof.

Special damage is defined in Section 48A of our Code, and are all damages which plaintiff alleges and proves that [239] he has suffered in respect to his property, business, trade, etc.

The evidence given before the court in the present matter shows conclusively that at the time the plaintiff took over the Carrier Furniture Company, there were \$49,000 in antecedent debts which were past due and the plaintiff's own testimony along with the other evidence introduced in plaintiff's case, again shows conclusively that in the intervening period, up to the date of trial of this action, the plaintiff's business has prospered. This also is stated on the face of the complaint, that she has a substantial business at this time. Accordingly,

there has been absolutely no evidence of damage of any kind, either by direct proof or by innuendo.

Evidence of the plaintiff in this matter shows that there has been no ill will or malice, by her own statement. She said that none of the defendants or their employees had any malice or ill will on her behalf.

I would like to return for one moment, your Honor, to the allegation in the complaint on damages. It appears to be the California law, as set forth in *Smith vs. Los Angeles Bookbinder*, 133 C.A. (2) 486, that an allegation that plaintiffs have been injured in trade or business and occupation in a designated sum by reason of publication of alleged libelous matter is an insufficient allegation of special [240] damages.

In the particular case, in the complaint, and in the proof of the complaint, there has been no itemization or bringing out of special damages of any nature. The entire proof and allegation is that she was damaged in a blank sum.

This holding has been upheld in other jurisdictions which I could mention.

Knickerbocker Life Insurance Co. vs. Ecclesine, 34 N. Y. Superior Court 76; *Bell vs. Sun Printing & Publishing Co.*, 42 N. Y. Superior Court, 567; *Peabody vs. Barham*, 52 Cal. App. (2d) 581.

So, upon the fact of the complaint there has been no showing that the material published by plaintiff was defamatory on its face, no allegation with the exception of the marital difficulty that it was understood by innuendo to be defamatory, and upon this

point there has been no evidence at all presented to this court.

On the other points, there has been no evidence presented that these were defamatory. Certainly the fact that a person hires a manager is not defamatory per se. Certainly the fact that a person is on a C.O.D. basis and is slow payment is not defamatory per se.

And furthermore, the evidence presented to this court by the plaintiff admits without equivocation that these are the facts. [241]

When Mrs. Carrier assumed this business ownership, of this business in 1953, she was again \$49,000 in debt, in past due obligations. Of course, she did assume, along with the indebtedness, \$70,000 in assets.

At this time she admits she was either on a C.B.D. or a C.O.D. basis, and that she was slow pay.

She admits that (1) Mr. Carrier had had a manager at one time and that (2) she had somebody running the second budget store for her.

Now, it is also the California law, and I might state that this is the general law of all of the 48 states, either by code or by case law, that under certain conditions a publication requested by an interested party from an interested party is granted a cloak of privilege, a conditional privilege to be sure, and in our particular case this conditional privilege is granted by our Civil Code Section 47, Subdivision 3, which reads in part as follows:

“In a communication, without malice, to a person interested therein, (1) by one who is

also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.”

Any person falling within this description in our code [242] section is granted a privilege. This privilege can only be removed by the showing of actual malice.

Section 48 of our Civil Code defines malice as ill will, actual malice, not that implied from a publication.

In the event a person falls within the purview of this code section, it is then immaterial that the communication was false or defamatory, unless it was used for a wrongful purpose or with malice as defined, actual malice.

A mercantile agency, your Honor, is a very necessary part of our modern system of business. We have become so big and business so great that it is impossible for one merchant to know all of his purchasers, and in order to grant credit upon a reasonable basis, it has become necessary for specialized agencies to take on the job of specially finding out about retailers, wholesalers, anybody to whom a manufacturer or other party would extend credit. This function has become so important that the mercantile agency per se by our courts has been granted a cloak of privilege. It falls within our code section automatically, but in our case law and the case law of other jurisdictions it has been stated

unequivocally that a mercantile agency is per se granted the cloak of privilege which can only be revoked upon a misuse, wrongful purpose, actual malice, ill will.

In the case at bar the defendant is a mercantile agency and mailed the report to seven of its subscribers on their [243] demand in accord with the terms of a written contract, agreement to furnish such information upon their request.

Hence, clearly the defendant comes within the court's decisions that a mercantile agency is privileged and also would be within the purview of our California Civil Code.

If your Honor please, in the case of Watwood vs. Stone Mercantile Agency, 194 Fed. (2d) 160, 90 U. S. App. (D.C.) 156, 344 U. S. 821, in which the Supreme Court denied certiorari, we had a case where a mercantile agency published the following facts in a credit report.

That a woman, and she was named, was single, that she had a child, and that she had sued a certain named man for breach of promise, when in truth the facts were that she was not single, she did not have a child, and she was the wife of the man they stated she sued for breach of promise. The court held in this case as bad as the statement was, that the mantle of privilege cloak upon a mercantile agency was sufficient inasmuch as there was no ill will or wrongful purpose behind the communication, grossly in error as it may have been, that it did not state a cause of action, and that the mercan-

tile agency was not responsible for a claim based upon a libel suit.

In the New York case of *Ormsby vs. Douglas*, 37 N. Y. 476, there was an alleged libelous statement to the effect that the plaintiff was a man of no responsibility, that he [244] was a bad man and that he worked for counterfeiters and was a counterfeiter himself. There the court said, and I quote:

“The rule is well settled, that a communication, which would otherwise be slanderous and actionable, is privileged if made in good faith, upon a matter involving an interest or duty of the party making it, though such duty be not strictly legal, but of imperfect obligation, to a person having a corresponding interest or duty,”

and they cite another New York case:

“and this principle applies to an agent employed to procure information as to the solvency, credit and standing of another, who communicates confidentially, and in good faith, the information obtained, to his principal, who has an interest in the subject-matter.”

This is *Washburn vs. Cooke*.

In the present case, again it is admitted that these publications were made to persons interested, at their request, under the terms of a written contract, and in no place in the evidence has there been anything tending to show wrongful purpose or ill will on the part of the publishing defendant.

The contracts set forth the duty between the defendant and seven persons to whom this information was published, are in evidence and speak for themselves, your Honor. [245]

Where an alleged libel is privileged, as it no doubt is in this case, the plaintiff, in order to recover, must prove actual malice.

The California courts have held in *Freeman vs. Mills*, 97 C.A. (2d) 161, 166, and in *Snively vs. Record Publishing*, 185 Cal. 565, that even though a statement may be defamatory and false, it is privileged if it is published without malice, and if it affirmatively appears that a communication was privileged, in order to make a prima facie case, the plaintiff must prove the existence of malice.

Locke vs. Mitchell, 7 Cal. (2d) 599.

And if your Honor would bear with me I would like to read the portion of the case under headnote No. 1:

“Privilege must be pleaded as an affirmative defense to an action for libel,”

citing a California case,

“except where the existence of the privilege is disclosed on the face of the complaint.”

In our case, the complaint definitely showed that this was a mercantile agency under contract and invokes the privilege.

In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for sup-

posing the motive for the [246] communication innocent, or who is requested by the person interested to give the information, there is this cloak. Those were my words, your Honor.

Again quoting:

“Furthermore, while in the case of a false and unprivileged publication, libelous per se, malice is implied, and lack of it is a matter of defense, which need not be pleaded” (citing cases), “this is not true of a qualified privilege, for section 48 of the Civil Code expressly declares that ‘malice is not inferred from the communication or publication’ in the cases provided for in subdivisions 3, 4 and 5 of section 47. Hence, where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact.”

This was also upheld by *Snively vs. Record Publishing Co.*, 185 Cal. 565, as I previously cited.

The Court: That is the *Snively* case.

Mr. W. E. Catlin: Courts in other jurisdictions have upheld that the very nature of a mercantile agency in gathering and publishing reports, in the ordinary course of business, rebuts any idea of malice in the transaction, and I will cite *Douglass vs. Daisley*, 114 Fed. 628, 637.

Also, I would like to call to your Honor’s attention the [247] fact that our courts have held in California that mere inadvertence or forgetfulness

or careless blunders is not evidence of malice, nor is negligence or want of sound discretion, nor the mere fact that the statement is untrue. *Davis vs. Hearst*, 160 Cal. 143, 157.

The plaintiff, in all its evidence presented to this court, has shown and based its entire matter upon the fact that perhaps the reporter employed by the Lyon Mercantile Agency who created these reports made several small errors in assembling the reports. It has not been shown that these errors are of any consequence or that they have proximately caused damages in any amount.

One other point, your Honor: Truth is a complete defense to an action for libel, and our California cases are in accord and it is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark, and I cite *Edme vs. San Joaquin County*, 23 Cal. (2d) 146, *Heuer vs. Kee*, 15 Cal. App. (2d) 710, 714; *Dethlefsen vs. Stull*, 86 Cal. Appeals (2d) 499, 506; *Kurata vs. Los Angeles News*, 4 Cal. App. (2d) 224, 227.

The evidence of the plaintiff as submitted on the alleged false statements has not proved that these statements were false generally, but that they were perhaps inaccurate [248] in some detail. Again, the details have been small and again there has been no showing that any damages resulted from the small details.

In summation, your Honor, the defendant is a

mercantile agency cloaked with a privilege, a conditional privilege, unless their publication was tinted with malice or was used for a wrongful or illegal purpose.

There has been no showing that anybody connected with the defendant company had any malice toward the plaintiff.

There has been no showing of any nature that this information was published for a wrongful or illegal purpose.

As a matter of fact, the plaintiff's evidence has shown conclusively that as her credit increased, as her business expanded from the admitted form or condition in which she assumed it, which we grant was a burden, and as she was able to work her way out, we gave her credit whenever credit was due and that our ensuing reports from the original one reflect the upswing in her business.

This in itself in my estimation, your Honor, is excellent evidence of the lack of malice.

Thank you, your Honor.

The Court: All right. Mr. Licht?

Mr. Licht: Your Honor, I find myself in a strange position of agreeing with many of the points made by the attorney for the defendant.

I agree that there were many truthful statements made in these reports and I agree that Mr. Halfyard or any of the partners were certainly not activated by malice at the time they made their reports, since it appears quite obvious that they didn't even know her.

And I also agree that this is their job to report, this is the business they have undertaken.

But after that, I disagree with them on pretty basic issues, substantially on what the law is with respect to their duty and particularly on what he refers to as small errors.

At the time Mrs. Carrier took over this business, it was admittedly in a poor condition. Then she had substantial indebtedness.

Mr. Hill testified that in his opinion if it had gone into bankruptcy, the creditors would have gotten approximately 25 per cent of what they did actually receive, and things were in a pretty bad way. There is no doubt about that. But I submit, your Honor, that under these circumstances which existed at that time which create a duty on the part of the defendant of which we complain, if I am a subscriber and I pay several hundred dollars a year for the services, as those reports indicate the subscribers do, I am not interested in getting a report on Barker Brothers, because I know that if my salesman sells Barker Brothers I am going to ship to them, [250] I am not going to ask Lyons for a report. What I am interested in as a subscriber are the marginal or the borderline people that my salesmen call on, the Wishmaker House in Phoenix, and that is the reason that I subscribe, and when I ask for a report on them, I don't ask them to do the impossible; all I ask them to do is to convey to me the information that they have, and that is all their job is. I don't believe their job is to color it. I don't believe their job is to do

anything but convey to me as a subscriber the information that they have.

Now, I think that under the cloak of the privilege that was discussed, it could well be argued that they had a right under that privilege to report false information, but, and this is where we differ sharply, in reporting false information, if it is, they must report accurately the information they are supplied. This is the whole gist of our case, your Honor.

Our case isn't that this man was going to try to "fix" Mrs. Carrier. He didn't even know Mrs. Carrier, and neither did any of the other parties to this.

Our point is that they in undertaking to report this lady's financial condition, in assuming to determine for suppliers throughout the United States, some hundreds of suppliers that they have, whether or not they should ship to this woman, they have a duty to her as a businesswoman to [251] report the truth that they receive of the information that they receive.

If it turns out to be false, as in the case of the lady that they spoke about who turned out to be married, then, they say, "Well, the only information that we had was this." This isn't our case at all.

Your Honor, there is a case which is exactly like ours, I believe, and that is the case of *Douglass vs. Daisley* which was cited by counsel. In that case the information was that the defendant reported the plaintiff had made a general assignment for the

benefit of creditors, when in fact he did not, and the court, in what appears to me at least to be a learned discussion of the question of qualified privilege, stated:

“Where a false report originates in the office, and is not based upon information, the circumstances and the occasion do not necessarily involve a privilege. Carrying the qualified privilege to communications of the character in question, by rule of law, would be carrying the doctrine of immunity beyond the rule in respect to absolute privilege.”

In other words, the court here said that “if these people are going to pay me to report, I can report anything I want, as long as I don’t know the person, as long as I am not activated by privilege.”

They have a greater privilege even than the absolute privilege allowed to us here in court.

They cite Mr. Bigelow on Torts and a discussion on it. Then, discussing again the further issue of a reporting agency:

“It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless and wanton exercise of a right of this character, and afford immunity on the ground of privilege.

It is equally difficult, starting with a privileged occasion, to find a principle which would justify an absolute ruling of law upon the question of liability upon the ground of variance between the information received and that sent, and this is for the reason that the variance may be susceptible of explanation."

So, they say in this case, as I read it, and I respectfully request the court to read it, it is about eight or ten pages long and is right on the very point in this case, that if they take the information that they receive and they [253] faithfully convey it to their subscribers, they are staying within their privilege. But their duty to this person who has no connection with them at all is to report the information that they receive. What information did they receive? They received information that she was in this very precarious condition. There is no question about that. And it would seem to be, your Honor, in doing their duty to their subscribers, they would have reported that.

The Court: Well, Mr. Licht, I don't mean to interrupt you, but I can't take the time out now, and the court has to prepare himself ahead of time, so I will deny the motion and let them proceed with the defense. I will follow up on that case that you have, but I won't take the time to read it right now.

Mr. Licht: It would be the same argument at that time.

Mr. W. E. Catlin: You deny the motion?

The Court: Yes, yes.

Mr. W. E. Catlin: If your Honor please, could we have a five minute recess to obtain our witnesses?

The Court: Certainly.

(Recess.)

The Court: You may proceed.

(Whereupon the defendant, to maintain the issues on its behalf offered and introduced the following evidence, to-wit):

Mr. W. E. Catlin: I will call Mr. Paul Abernathy, your [254] Honor.

The Court: All right, Mr. Abernathy.

PAUL E. ABERNATHY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Paul E. Abernathy.

Direct Examination

Q. (By Mr. W. E. Catlin): Mr. Abernathy, what is your business?

A. At the present time I am a credit manager.

Q. Have you ever been an employee of the Lyon Furniture Mercantile Agency? A. Yes.

Q. And what was your position when employed?

A. Collection manager.

Q. Would you tell me the date that you were associated with Lyon and the date that you left?

A. June, 1950, I commenced employment; terminated June, 1956.

(Testimony of Paul E. Abernathy.)

Q. Was the termination of your employment voluntary on your part? A. Yes, it was.

Q. Mr. Abernathy, do you have, or did you have at any time while you were employed as a Lyon Furniture Mercantile [255] Agency employee, and do you have at this time, any ill will, malice or animosity toward Mrs. Carrier or the Carrier Furniture Company? A. No.

Q. Mr. Abernathy, did you ever meet Mrs. Carrier personally? A. Yes, I did.

Q. When was the first time that you met her personally? A. April of 1955.

Mr. W. E. Catlin: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Licht): Mr. Abernathy, when you were the credit manager—the collection manager of Lyon's, did you keep a file on each individual account on which it had matters for collection?

A. Yes.

Q. And was there such an account on the Carrier Furniture Company, that you remember?

A. I believe so, yes, sir.

Q. And have you seen that file recently?

A. No.

Q. Do you recall when I took your deposition several months ago; had you seen the file at that time? A. Previous to that. Not since.

Q. I show you what apparently is a carbon copy of a [256] letter to you signed David E. Wil-

(Testimony of Paul E. Abernathy.)

son, dated August 19, 1954, which is part of Defendant's Exhibit E and you will see that it says:

"Dear Mr. Abernathy:

"Replying to your letter of August 16."

Do you know where that letter of August 16 is?

A. I do not.

Q. Do you have any way of telling from the contents of this letter what was contained in that letter of August 16th? A. No.

Q. Was it your custom in your job to keep copies of letters that you wrote? A. Yes.

Q. And would they generally be in the same file with the answers that you received? A. Yes.

Mr. Licht: Exhibit E.

I have nothing further.

Mr. W. E. Catlin: That is all, Mr. Abernathy.

At this time, your Honor, the defendant will renew its motion and rest.

(Whereupon the defendant rested its case.)

Mr. W. E. Catlin: May we have findings of fact and law in this matter, your Honor? [257]

The Court: Yes.

Well, all I can do on your motion is to deny the motion and submit the matter for the record, that is all I can do.

Mr. W. E. Catlin: That is right.

The Court: In other words, that is all I can do, to keep the record straight.

Mr. W. E. Catlin: That is right.

The Court: And you want findings. Now, do

you want to argue orally at this time? What is your disposition on that matter?

Mr. Licht: Yes, I would just like to argue it very briefly, your Honor.

The Court: All right. You have covered most everything on the motion.

Mr. Licht: I think so. That is correct.

The Court: I might say that I sustained that objection on punitive damages, so I couldn't allow any punitive damages. I disagreed with you on that, so that question will be out on punitive damages.

Mr. Licht: Yes, that is correct.

The Court: So that question will be out, on the question of punitive damages.

Mr. Licht: I thought that was it by the nature of the ruling, your Honor.

The Court: Yes. [258]

Mr. Licht: I only have this request, in summation on behalf of the plaintiff, and that is to examine the information that was available to the defendant throughout this period of great duress on behalf of my client and to ask, as I have asked myself, whether it appears that they honestly reported the information that they had available, and if they did not honestly report it, what damage resulted?

We have just briefly been going over the cards which the defendant had, which indicated certain persons who got reports. That was a matter which was pleaded in our complaint and which was admitted by the answer, and we have also stipulated to it. However, we have just been examining these

cards, and Mr. Linsenmeyer points out to me that in comparing the numbers of the agreements with the cards, it appears that Charm House, one of the ones who we alleged got a report and who the defendant by stipulation admitted got a report, doesn't show on the card. It also appears that Huntley, another one of the same situation, doesn't show on the card.

It also appears that J. S. Greene didn't get a report. I think this is important for only one thing, to show that the cards are not complete.

Mr. W. E. Catlin: Mr. Licht, and if your Honor please, I want to pass once piece of information to Mr. Licht that apparently he does not understand. These cards are only the cards of the Los Angeles office. There are seven other [259] offices with cards of this type.

Mr. Licht: This is one of my points. I am very well aware of that. This goes to show, as far as I see it, that the burden of the plaintiff in attempting to show how she was directly damaged by these reports is almost impossible.

I asked the man who was here how he could tell what persons throughout the United States had received reports, and he said he couldn't even tell from these cards where the numbers had letters like, for instance, "B's" in front of them, which called for a different office than his, what people got it.

I submit, your Honor, that it is obvious that probably every person who Mrs. Carrier contacted to sell her received or got information from Lyon's,

as I know from my own limited experience in the business people do. It is the most natural thing to do, if you are a manufacturer, to find out what Lyon's report has. And it is also most natural, as my experience has shown me, and that is on the question of this balance sheet which is attached to that. Now, I have had it happen to me many times with a client who would say of his own balance sheet, "I don't understand what all these figures are. How am I? What kind of a condition am I in? What is going on?" Because there are so many people who don't really understand them, that is the reason why they hire Lyon's. Anybody could have gotten this balance sheet. It was [260] submitted, as your Honor will see from the evidence, to all of the creditors, some 60 of them, it was also submitted to Lyon's.

But what is important is Lyon's interpretation. That is what they pay them for, and Mr. Halfyard said that it was substandard, it was below their average. That is the important information, to me, to a credit man who is about to extend credit, who says on the witness stand at this time that it is above average. The assets, no matter how he tears them down, show between three and four times the liabilities. But the language doesn't say this.

Now, this 50 per cent thing is kind of important. If I were a credit man and if I saw on a report that somebody offered creditors 50 cents on the dollar on both open accounts and on accounts in judgment, I don't think I would ship to them. This isn't a fact, your Honor, and this isn't a fact as

they knew it. They had the agreement at that time which was in existence showing that she paid 43 per cent on the first payment, and nothing whatever about her paying 50 per cent. On the contrary, all the letters, everything in their file indicates that this woman was trying desperately to settle for a hundred cents on the dollar.

There was never any thought of settlement until a year and a half later, when by her testimony and all of the correspondence it was said that she couldn't get merchandise here, [261] no other choice, but she said, "I will go to my friends and I will borrow \$6,000 and I will give you \$3,000 and I will put \$3,000 in merchandise, if you will settle the balance of \$9,000 for \$3,000." I submit, your Honor, that that is substantially different from settling for 50 cents on the dollar, and I think that these defendants are charged with knowing that, they are charged with knowing what is in their file. I don't think Mr. Halfyard can say, "Well, it was in the credit file, I didn't know about that." That is their organization. He knew perfectly well that there had been items for collection. He also knew that they were paid, but he said, "Well, we don't put that in our report." And I had that written up, because there seemed to be some question about what he said when I asked him about that, because I knew that they do put that in the report, they are in the collection business, too, and that is very fine, but if I were in the collection business and I had items placed with me for collection, I would be proud to report to my—

Mr. Lindenbaum: I think it is out of order for Mr. Licht to say he knew something, unless he took the witness stand and testified, because it is unfair, it is not part of the record, and he is making inferences and innuendos here that are absolutely prejudicial to the defendant.

Mr. Licht: I am arguing the matter, your Honor.

The Court: Yes, I will let him complete his argument. [262] He is arguing on the subject.

Mr. Licht: They were in the collection business, and it seems logical to me, if that is more allowable, Mr. Lindenbaum, it seems logical to me that if I were in the collection business that I would want my customers to know how I did on collections, and I submit by the evidence of the one report which I was able to find, they said right on there, "Collections made by our account," and here is what he said:

"Q. (By Mr. Licht): Well, if you read that as a credit man or if you wrote it, would you intend to convey that it was paid or that it wasn't paid?

"A. In reading this to me it would mean that they were paid.

"Q. And you would never in a report on a situation like that report that it was paid?

"A. No. I have never know that to be done."

And yet, I happened to find a report on an entirely different account which shows that they do that, your Honor, and it is logical that they do that.

Now, I am not going into this in any further detail. I think your Honor can just become as

familiar with the facts as I am, by just reading the exhibits.

But I submit, your Honor, that this is a case where these people have breached the duty that they owed to Mrs. Carrier. They owed her a duty of fair play and they didn't [263] give it to her.

I submit that it is substantial damage and I respectfully request the court to so find.

Mr. Lindenbaum: Your Honor, I would like to address the court and just say a few words.

The Court: Certainly.

Mr. Lindenbaum: Let us take the last point, first, that Mr. Licht brought up about collections.

When a person sells another merchandise on time, such as two per cent ten days, net 30, they legally obligate themselves to pay at that time, and any credit man throughout the United States is very much interested to know as to whether items have been placed for collection, because that means that some creditor had to go to the expense and place items of collection with either the Lyon Agency or with lawyers and that the original time of the debt was not met. That takes care of the importance.

Whether they were ever paid or not may be important to Mr. Licht, but to a credit man, the fact that they had to go to collection, when they don't meet their obligations when they are due, is of utmost and prime importance.

Now, we have contracts, not with Mrs. Carrier. We have contracts with our subscribers.

If we were negligent in connection with a given

subscriber, he might be in a position to sue us for breach of [264] contract. But I submit to your Honor the fact is in this case that we were not negligent at all.

All we did in this case was this: Mrs. Carrier comes with a very sympathetic story that I certainly don't want to go into, about her marital difficulties. All we did in that connection, your Honor, in our report was to say that she had acquired the business as a result of marital difficulties.

They, in their complaint, and on the witness stand, admit that she acquired the ownership of the business as a result of a divorce decree, and it is because we used the words "marital difficulties" instead of "divorce decree," they say by innuendo we say she got the business by coercion and duress. Now, that is certainly stretching the use of language and attempting to create such chaos and confusion that it has definitely no meaning and isn't applicable.

Another thing, your Honor, is this: Mrs. Carrier said something on the stand the other day, that she believes in acts and not words. I commend her. So do I, and every right-thinking person should feel the same way. But what happened in this case is that Mrs. Carrier is the one that is dealing with words, not us. She was a married woman. She had a child of eight and a child of fourteen and yet she wants to convey to the court the fact that while she had two infants that she spent twelve hours a day at the place of business. It is absolutely unbelievable. [265]

When did she for the first time become officially known to the world and to any reporting agency that she owned a business? It wasn't until around September, 1953, and we reported that she was the owner of that business in December, 1953.

She says, she complains about the use of the word "manager." Mr. Catlin has called that to the attention of the court and everybody knows there is no libel about saying a person has a manager in connection with operating a business. She admitted that she had a manager for a period of time. She admitted that her husband had a manager for a period of time. And many multi-million dollar businesses are being operated by managers.

How can she say by innuendo or by any means say that we castigated her by saying she had a manager?

Then, the next complaint she has is that she said we said she was slow pay. Your Honor, it is admitted very clearly in this case, whether it is a sad story or not, it is our duty to objectively report to anybody that may be a thousand or more miles away from the area where they are shipping merchandise. The fact of the matter is, and I am not going to deny it, and I personally have no knowledge of it, that she may have had a tough struggle, she said she was operating the business on a shoestring, she admitted it on the witness stand, she admitted that she was doing the best [266] she possibly could do. She admitted that when she took over the responsibility and obligation of that \$49,000 she was supposed to pay it, but did

she? She didn't pay the \$49,000. She paid a percentage of it, 79 per cent of it. So Mr. Licht says, "Oh, 50 per cent is a terrible thing." We have a letter, and it is in evidence, your Honor, from Attorney Wilson saying that she offered 50 per cent. The letter is addressed to Virtue Brothers here in California. And we have a copy of that letter and it is in evidence, that she did offer 50 per cent, but that isn't very material, because actually, even though she may have struggled, she did not pay her indebtedness in full.

It is our duty objectively to coldly report the credit, the fact that Mrs. Carrier had an extension and did not meet her extension but had this compromise, and it is up to the credit man to decide do they want to gamble with this party or not. It is not up to us. We are not the ones to tell them extend credit or don't. We give them as much information as we have available and we say, "Judge for yourself." As a matter of fact, Mr. Baumritter's representative was here on the stand and he said despite the 13-6 credit, we gave her over a thousand dollars of credit, and he still calls on the account.

The last point, there are only five points in this case, that they complain of in their complaint, all throughout, is [267] that she is on a C.O.D. basis. Your Honor, from her own mouth she conceded she was on C.O.D. and C.B.D., and she also admitted that she had the difficulties prior to the issuance of our report of March, 1954.

One last point and I am through. I got up un-

prepared and I hope you will bear with me. No. I will leave it with you.

May I take this opportunity on behalf of Mr. Linsenmeyer and myself to thank the court for extending us the courtesy of appearing here, sir.

The Court: All right. This is not for the record.

Mr. Lindenbaum: No, this is not for the record.

The Court: Off the record.

(Discussion off the record.)

The Court: We will go back on the record in this particular case.

The record is going to be marked that the case is under submission, because I am not going to make any immediate decision. I am going to do something I have never done before, but I have to keep my work up, with the press of work, and as I say, it is going to be marked under submission and my ultimate decision is going to be given for the plaintiff, and I am going to ask Mr. Licht under the circumstances, inasmuch as this court is so busy, to prepare a brief to me in about ten days, for you to prepare a brief on which you [268] think the damages should be.

I am not going to allow any punitive damages. I have already stated that.

I mean I thought maybe that you would review the testimony and what you feel as to what the damages should be, not a lengthy brief, but you are so familiar with it, and then I would let Mr. Catlin, and of course Mr. Lindenbaum being from New York, have ten days to reply, and if you want a little more time to reply, Mr. Catlin, on that, be-

cause you might want to correspond with Mr. Lindenbaum.

Mr. Catlin: I would appreciate a little more time than that.

The Court: I just said ten because I figured that Mr. Licht is right here in Beverly Hills, and you will probably have the laboring oar. You won't be consulting with your Phoenix counsel, will you?

Mr. Licht: No, your Honor.

The Court: And shall we give them, say, 30 days, because of the fact your situation is a little different. In other words, Mr. Lindenbaum will be in New York and Mr. Catlin in his answer might want to send it to Mr. Lindenbaum, back and forth, before he files it in court. So it will be just on that question of damages. Then the court will ultimately enter its order for the plaintiff. It will be on what he feels the damages to be. I am not certain on it now. [269]

There will be no punitive. You both understand that.

Mr. Licht: Yes, I understand that.

The Court: But for the record, the case will stand submitted at this time.

Mr. Licht: Thank you.

The Court: In writing this memorandum you can write it with the thought of the way the court has expressed its opinion.

Mr. Licht: Thank you very much. [270]

[Endorsed]: Filed July 24, 1957.

[Endorsed]: No. 15778. United States Court of Appeals for the Ninth Circuit. Lyon Furniture Mercantile Agency, Appellant, vs. Irene M. Carrier, doing business as Wishmaker House, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 26, 1957.

Docketed: November 5, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15778

LYON FURNITURE MERCANTILE AGENCY,
Appellant,

v.

IRENE M. CARRIER, dba Wishmaker House,
Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes Now the Appellant and files herewith its Statement of Points and Designation of Record in accordance with Rule 17(6) of the Rules on Appeal.

Designation of Points On Appeal

1. Did the Court below err in not granting the appellant's timely motion requiring the appellee to file an undertaking as a condition precedent to the maintenance of this action for damages for libel?

2. Did the Court below err in not granting the appellant's motion for a dismissal at the conclusion of the appellee's evidence?

3. Did the Court below err in failing to find that the credit reports complained of and set forth in appellee's amended complaint were privileged as a matter of law and as provided by Section 47, Subdivision 3 of the Civil Code of the State of California, and likewise failing to find that they were factually and substantially true, and also failing to find that they were made without malice in that malice was not inferred, as is clearly set forth in Section 48 of the Civil Code of the State of California?

4. Did the Court below err in failing to find that the appellant is and was at all times a National Credit Agency engaged in the business of issuing credit reports in the furniture industry to members or subscribers of said Agency?

5. Did the Court below err as a matter of fact in failing to find that the appellee did not suffer any damages by reason of the issuance of the credit reports complained of based upon any testimony given at the trial?

6. Did the Court below err in failing to find that

as a matter of law the appellee could not recover any damages in the absence of a specific finding that the reports complained of in appellee's amended complaint were not privileged, or if privileged that they were actuated by malice?

7. Did the Court below err in failing to find on material allegations both in appellee's amended complaint and in appellant's answer in the following respects:

a. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph IV of appellee's amended complaint.

b. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph VI of appellee's amended complaint.

c. The Court below has failed to find and there is no finding with respect to the allegations set forth in Paragraph IX of the appellee's amended complaint.

d. The Court below has failed to find and there is no finding with respect to the allegations set forth in appellant's first and second affirmative defenses.

e. The Court below has failed to find and there is no finding with respect to the allegations that the communications complained of were privileged and were published without malice.

8. Did the Court below err in finding that the appellant was "grossly negligent in its conduct" as

found in Paragraph V of appellee's Findings of Fact on file herein?

Designation of Record

Amended Complaint for Libel.

Answer to Plaintiff's Amended Complaint.

Designation of Record on Appeal.

Findings of Fact and Conclusions of Law.

Judgment.

Minutes Orders of Court—8/23/55; 9/24/57.

Names and Addresses of Attorneys.

Notice of Appeal.

Notice of Hearing and Motion to Require Plaintiff to file an Undertaking, and Motion for More Definite Statement.

Notice of Motion and Motion for a New Trial and for an Order directing the entry of a Judgment for Defendant.

Points and Authorities in Support of Defendant's Motion for a New Trial and for an Order Directing the entry of a judgment for defendant and For an Order Amending the Findings of Fact and Conclusions of Law.

Stipulation re Amount of Cost Bond on Appeal and Supersedeas Bond and Order Thereon.

Substitution of Attorneys for Defendant.

Appellee's Exhibits 1 to 16, inclusive, and Appel-

lant's Exhibits A to I, inclusive, as designated in the "Certificate By Clerk" and two volumes of Reporter's Official Transcript of proceedings had on May 14, 15 and 16, 1957.

Dated: November 4, 1957.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 6, 1957. Paul P. O'Brien,
Clerk.

